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THE ADMINISTRATION OF SUCCESSIONS: ANGLO-AMERICAN INFLUENCE UPON LOUISIANA LAW*

*Sidney Pugh Ingram***

Let's choose executors, and talk of wills.

Richard II, III, 2

History is not a reliable means by which to predict the future, but it is the most nearly reliable that man, in his frailty, possesses. An understanding of the law of successions that is applied in an age produces a clearer perception of the nature of an age. And the nature of an age is a key to its events. This paper treats the changes that took place in that part of the Louisiana law of successions that affects their administration, under the influence of the Anglo-American law regulating the administration of estates.

The Louisiana law was civilian at its beginning because the policy of the mother countries, France and Spain, required that it be. It became susceptible to the influence of the Anglo-American law because of Louisiana's geographical and political relation to the former British colonies to the east.

I. THE DEVELOPMENT OF SOCIAL FORCES IN LOUISIANA

Louisiana was established as a French colony in 1699.¹ The French Crown, in 1712, granted the colony to Antoine Crozat under a charter providing that the colonial judiciary was, in civil suits, to apply the Custom of Paris, a written compilation of customary law that contained both Roman and Germanic elements. In 1717, Crozat surrendered his charter. The colony was granted to John Law's Company of the West with the requirement that the judiciary continue to apply the Custom of Paris.²

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1. See 1 FORTIER, *A HISTORY OF LOUISIANA* 35-46 (1904) [hereinafter cited as FORTIER].

2. See McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1

In 1732, the company failed and Louisiana became a French crown colony, the Custom of Paris remaining in force.³

France secretly ceded Louisiana to Spain in 1762 by the Treaty of Fontainebleau. Four years later Ulloa, the first Spanish governor, arrived in New Orleans to assume possession of the colony in the name of Spain. The population, being of French ancestry, expelled Ulloa and established an independent government. Supported by Spanish troops, O'Reilly, the succeeding Spanish governor, landed in the colony in 1769 and put down the insurrection.⁴ A proclamation was issued that declared the Custom of Paris abolished.⁵ A code of Spanish law, supplemented by "instructions" prepared by two lawyers on O'Reilly's staff, was substituted.⁶

In 1800, Louisiana was secretly ceded to France by the Treaty of San Ildefonso, but France did not take possession immediately.⁷ After selling Louisiana to the United States, France under Laussat⁸ took possession of the former colony for a period of three weeks before surrendering possession to the United States on December 20, 1803.⁹ No attempt was made to reestablish the French law in this brief period.¹⁰

The next year, the United States Congress divided the land purchased into two separate political entities, the District of Louisiana (containing the land north of the thirty-third parallel) and the Territory of Orleans (containing the land south of the thirty-third parallel).¹¹

At the end of the Spanish colonial period, the land within the boundaries of the Territory of Orleans (which was later established) contained a population of 50,000. Settlement was

(1960) [hereinafter cited as McMahon]. The first serious case to arise in the Colony after its capital had become fixed at New Orleans was *Ceard v. Chauvin Freres* (1724). See Dart, *Ceard's Case* (1724), 5 LA. HIST. Q. 155 (1922).

3. See McMahon, at 1.

4. See 1 FORTIER, at 159-212.

5. See McMahon, at 1.

6. See CROSS, SUCCESSIONS xxiii (1891). It is generally thought that the Code and "instructions" were derived from the *Recopilacion de las Indias* and the *Recopilacion de Castilla*, which, in turn, contained references to the *Codigo de las Siete Partidas*, the *Nueva Recopilacion de las Leyes de Espana*, the *Puero Real*, and the *Forum Juzgo*. See McMahon, at 1.

7. See McMahon, at 1.

8. See Introduction to LA. CIVIL CODE at xiv (Dainow ed. 1947).

9. See McMahon, at 1.

10. *Ibid.*

11. See 3 FORTIER, at 12.

concentrated in the southeast,¹² the lower part of the Mississippi River's delta where there were many large sugar plantations tilled by Negro slaves.¹³ New Orleans, a center of trade for the American frontiersmen of Tennessee, Kentucky, and the Northwest Territory, as well as for the Louisiana planters,¹⁴ had a population of 10,000.¹⁵ The north and west, with the exception of a narrow strip of alluvial lowland lying near the Red River, were thinly settled.¹⁶ Distinctions in wealth were great.¹⁷ The free population was predominantly French in language and ancestry.¹⁸

The sugar planters often found it necessary to obtain loans or advancements from the merchants of New Orleans to cultivate their crops and to prepare them for the market. In 1803, the New Orleans merchants held mortgages on most of the plantations.¹⁹

Louisianians of all classes²⁰ were in sympathy with the principles of the French Revolution.²¹ When, in 1793, news was received of the execution of Louis XVI, there was great rejoicing.²² Activity was not confined to the expression of sentiment. Many prominent men of the colony engaged in various open and

12. See 2 FORTIER, at 213.

13. See DAVIS, *LOUISIANA, THE PELICAN STATE* 122 (1959) [hereinafter cited as DAVIS]; 1 *LOUISIANA UNDER THE RULE OF SPAIN, FRANCE, AND THE UNITED STATES, 1785-1807*, at 119-23 (Robertson ed., 1911).

14. See STANDARD HISTORY OF NEW ORLEANS 545 (Rightor ed. 1900). More than half of the exports of New Orleans came from the Ohio Valley. *Id.* at 560.

15. See DAVIS, at 120.

16. *Ibid.*

17. *Id.* at 122; 1 *LOUISIANA UNDER THE RULE OF SPAIN, FRANCE, AND THE UNITED STATES 1785-1807*, at 37 (Robertson ed. 1911).

18. See 2 FORTIER, at 208.

19. See 1 *LOUISIANA UNDER THE RULE OF SPAIN, FRANCE, AND THE UNITED STATES, 1785-1807*, at 69 (Robertson ed. 1911). The phrases "New Orleans merchants" and "merchants of New Orleans" are used in this paper to refer to the wealthy or cultured inhabitants of cities or towns who were connected with commerce, such as factors, lawyers, or bankers, unless the text indicates that the phrases are to be given a narrower meaning.

20. See Declouet, *Memorial to the Spanish Government* (Faye ed. Dec. 7, 1814), 22 LA. HIST. Q. 795 (1939); Franklin, *Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319 (1942); Franklin, *Eighteenth Brumaire in Louisiana*, 16 TUL. L. REV. 917 (1942); Parkhurst, *Don Pedro Favrot, A Creole Pepys*, 28 LA. HIST. Q. 679 (1945).

21. See 3 GAYARRE, *HISTORY OF LOUISIANA* 327 (3d ed. 1885); 1 *LOUISIANA UNDER THE RULE OF SPAIN, FRANCE, AND THE UNITED STATES, 1785-1807*, at 283 (Robertson ed. 1911).

22. See Liljegren, *Jacobinism in Spanish Louisiana (1792-1797)*, 22 LA. HIST. Q. 47 (1939). Sentiment in favor of the Revolution was strongest in New Orleans. Orchestras at the theaters were frequently asked to play "La Marseillaise" and the bloodthirsty air "Ca Ira" was commonly sung. See 3 GAYARRE, *HISTORY OF LOUISIANA* 327 (3d ed. 1885).

concealed conspiracies to overthrow the Spanish rule and to substitute a democratic regime.²³ One hundred fifty colonists petitioned the French revolutionary government to seize the colony from Spain.²⁵ The French Louisianians were motivated almost as much by love of France as by adherence to the principles of the Revolution.²⁵

In 1805, the Legislative Council, the legislative body established by Congress for the Territory of Orleans, enacted the Crimes Act, which repealed all existing criminal legislation, defined crimes and misdemeanors, and provided that criminal proceedings should be conducted in conformity with the Common Law of England, and the Practice Act, which provided a rather simple body of procedural rules, taken mainly from Spanish sources, for the trial of civil cases.²⁶ Next year, the Legislative Council by resolution adopted a compilation of Spanish laws as the private substantive law of the Territory, but the resolution was vetoed by W. C. C. Claiborne, the territorial governor.²⁷ The Council commissioned James Brown and Moreau Lislet to prepare a digest of the substantive laws in force.²⁸ Rather than making the contemplated compilation, Brown and Lislet prepared a code modelled in form upon the Code Napoleon and derived in substance from the French and Spanish law. The Code, officially called the Digest, was adopted in 1808.²⁹

The transfer of Louisiana to the United States subordinated all social struggles of the later colonial period to the more critical struggle that arose between American and Latin cultures.³⁰

23. See Declouet, *Memorial to the Spanish Government* (Faye ed. Dec. 7, 1814), 22 LA. HIST. Q. 795 (1939); Liljegren, *Jacobinism in Spanish Louisiana (1792-1797)*, 22 LA. HIST. Q. 47 (1939); Parkhurst, *Don Pedro Favrot, A Creole Pepys*, 28 LA. HIST. Q. 679 (1945). It was hoped that a revolutionary invasion of the colony could be organized with the support of the United States. The young men of Natchitoches actively attempted to establish a revolutionary government.

24. See 3 GAYARRE, HISTORY OF LOUISIANA 327 (3d ed. 1885).

25. *Ibid.*

26. See McMahon, at 1.

27. See Franklin, *Place of Thomas Jefferson in the Expulsion of Spanish Mediaeval Law from Louisiana*, 16 TUL. L. REV. 319 (1942).

28. See *Introduction to LA. CODE OF PRACTICE OF 1870* at iii (Dart, 2d ed., 1942); 3 FORTIER, at 12; MCGINTY, A HISTORY OF LOUISIANA 53 (2d ed. 1951). Fortier indicates that Edward Livingston may also have been commissioned. See 2 FORTIER, LOUISIANA (BIOGRAPHICAL EDITION) 81 (1914).

29. See *Introduction to LA. CIVIL CODE OF 1870*, at xvii-xx (Dainow ed. 1947). The names "Digest of 1808" and "Civil Code of 1808" are now used interchangeably.

30. See MCGINTY, A HISTORY OF LOUISIANA 131 (2d ed. 1951).

One facet of this struggle was the clash between Anglo-American and civil law.³¹

The last two hundred years in Central Europe, and the last four hundred years in Western Europe, have been centuries filled with the spirit of nationalism. The French of Louisiana, although geographically remote from their mother country, had strong nationalistic feelings.³² They had expelled Ulloa because he was the instrument of Spanish rule,³³ and thirty years later some of them had supported the French Revolution partly because they thought the Revolution would bring about a return of Louisiana to France.³⁴ Nationalism, having as one of its characteristics the desire to preserve national institutions without regard to intrinsic worth, caused the French of Louisiana, when they were confronted with American attempts to force the Anglo-American law upon them, to struggle to retain the civil law.³⁵ The Americans, motivated by loyalty to their law and a belief in its superiority, sought to compel its adoption, but relaxed their efforts when they saw they were creating bitterness and hatred.³⁶

The Digest of 1808 was taken from both French and Spanish sources.³⁷ Because the French and Spanish laws had common roots in the Roman law,³⁸ the Louisianians took greater interest in the issue of civil law as opposed to Anglo-American law than in the issue of French law as opposed to Spanish law.³⁹ Anti-Spanish feeling was present in some degree at the deliberations of the redactors, however. Although the Commissioners were instructed to prepare a digest of the laws in force in the Terri-

31. See *Introduction to LA. CIVIL CODE OF 1870*, at xvi (Dainow ed. 1947); Franklin, *Eighteenth Brumaire in Louisiana*, 16 TUL. L. REV. 514 (1942).

32. See Flory, *Edward Livingston's Place in Louisiana Law*, 19 LA. HIST. Q. 528 (1936).

33. See 1 FORTIER, at 159-212.

34. See 3 GAYARRE, *HISTORY OF LOUISIANA* 327 (3d ed. 1885).

35. See *Introduction to LA. CIVIL CODE OF 1870*, at xvi (Dainow ed. 1961); Flory, *Edward Livingston's Place in Louisiana Law*, 19 LA. HIST. Q. 528 (1936); McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17 (1934).

36. See *Introduction to LA. CIVIL CODE OF 1870*, at xvi (Dainow ed. 1947). It is clear that the French of Louisiana thought that the Anglo-American law was not so refined as the civil law. Their view had a sound foundation with respect to certain legal areas. But the French appear to have been influenced by nationalism much more deeply than the Anglo-Americans, because they had closer ties to Europe, the source of nationalism.

37. *Id.* at xvii.

38. *Id.* at xiii.

39. *Id.* at xvi; McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17 (1934).

tory of Orleans⁴⁰ (roughly the present State of Louisiana)⁴¹ and although the laws in force were Spanish,⁴² many of the provisions of the Digest of 1808 were taken from the Code Napoleon or from the projet for the Code Napoleon.⁴³

The dominant purpose of the Commissioners in drafting the Digest of 1808 was to retain the civil law.⁴⁴ Yet, they could not have grasped civilian rules blindly; if their only goal had been the preservation of the civil law, they would have adopted the Code Napoleon.⁴⁵ In selecting the provisions of the Civil Code of 1808, the Commissioners must have considered the effect that these provisions would produce in the light of prevailing social conditions and philosophical beliefs.

No conflict between the propertied and the poorer classes existed in 1808. The poor were inarticulate because they were lacking in education⁴⁶ and almost without class consciousness⁴⁷ because land could be easily acquired.⁴⁸

The sugar planters and the merchants of New Orleans lived differently, held dissimilar attitudes, and had divergent interests. They could have reenacted two ancient struggles, that of feudal landholder and city merchant, and that of debtor and creditor. Their struggle, with respect to the law, was principally that of debtor and creditor.

Although the sugar planter was feudal in his attitude toward his slaves and his land,⁴⁹ he favored democratic government.⁵⁰ His views were suggested by his knowledge of the events of the French Revolution and by his reading of revolutionary literature.⁵¹ He thought that democratic government was desirable because it would improve the condition of men in general. Yet,

40. See *Introduction to LA. CODE OF PRACTICE OF 1870*, at iii (Dart, 2d ed., 1942); 3 FORTIER, at 12; MCGINTY, *A HISTORY OF LOUISIANA* 53 (2d ed. 1951).

41. See 3 FORTIER, at 12.

42. See *Introduction to LA. CIVIL CODE OF 1870*, at xiv (Dainow ed. 1947).

43. *Id.* at xviii, xix.

44. See MCGINTY, *A HISTORY OF LOUISIANA* 131 (2d ed. 1951).

45. See *Introduction to LA. CIVIL CODE OF 1870*, at xviii, xix (Dainow ed. 1947).

46. See SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* 31 (1939).

47. See *id.* at 28; MCGINTY, *A HISTORY OF LOUISIANA* 142 (2d ed. 1951).

48. See DAVIS, *LOUISIANA: THE PELICAN STATE* 122 (1959).

49. See Franklin, *Place of Thomas Jefferson in the Expulsion of Spanish Mediaeval Law from Louisiana*, 16 TUL. L. REV. 319 (1942); Franklin, *Eighteenth Brumaire in Louisiana*, 16 TUL. L. REV. 914 (1942).

50. See note 20 *supra*.

51. See Liljegren, *Jacobinism in Spanish Louisiana (1792-1797)*, 22 LA. HIST. Q. 47 (1939).

he claimed the right to hold slaves⁵² and, in 1812, he assisted in obtaining the adoption of a state constitution providing for government by the propertied classes.⁵³ Intellectually he favored, but emotionally he feared popular government. He reached the compromise typical of the nineteenth century landed classes in supporting a government democratic in concept but oligarchic in spirit.

The planter could have attempted to perpetuate feudal conditions through the provisions of the Code of 1808. The right of primogeniture⁵⁴ and the *fidei commissum* and substitution⁵⁵ could have been recognized. The planter did not press for the adoption of such provisions.⁵⁶ His democratic principles⁵⁷ prevented his favoring them and the great availability of land⁵⁸ rendered the use of legal devices to keep land in the family unnecessary. In the civil law land became a form of wealth, although the planter did not consider it as such in his private views.⁵⁹

The conflict between planter and merchant, thus, was basically that of debtor and creditor, although the attitudes of feudal landowner and city merchant added a second dimension to the conflict. The creditor sought to limit the debtor's freedom of conduct as much as possible so that the debtor could not injure,

52. See 3 FORTIER, at 12.

53. See La. Const. art. II, § 28 (1812). This provision restricted the right to vote to those who had bought public land or paid state taxes. The effect of this provision was to disqualify two-thirds of the adult freemen from voting and to place the government in the hands of a ruling coalition of planters and New Orleans merchants. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 121-22 (1939).

54. The right of primogeniture was recognized in various local French customs before the French Revolution, see 4 TOULLIER, LE DROIT CIVIL FRANCAIS n° 135-137 (6th ed. 1846-48), although it was not recognized in the written law based upon the Roman law which prevailed in other parts of France. See *id.* n° 131.

55. The *fidei commissum* and the substitution were specifically forbidden in the Digest of 1808. See La. Civil Code art. 40, p. 216 (1808).

56. Mr. Franklin suggests that the landed classes urged the passage of the resolution of 1808 (vetoed by Governor Claiborne) listing the Spanish laws which were to be in force in the Territory of Orleans because many of the Spanish laws designated were appropriate for a feudal society. See note 49 *supra*. However, it is much more probable that this resolution received the support of the landed classes, as of the other classes, because it removed doubt as to which civilian authorities constituted the law of the Territory and tended to assure the retention of the civil law. See *Introduction to LA. CIVIL CODE OF 1870*, at xviii (Dainow ed. 1947); 3 FORTIER, at 37-60; 1 FORTIER, LOUISIANA (BIOGRAPHICAL EDITION) 218-19 (1914); HATCHER, EDWARD LIVINGSTON 116-20, 246, 247 (1940); 2 LOUISIANA UNDER THE RULE OF SPAIN, FRANCE, AND THE UNITED STATES, 1785-1807, at 355 (Robertson ed. 1911).

57. See note 20 *supra*.

58. See DAVIS, LOUISIANA: THE PELICAN STATE 120 (1959).

59. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 117 (1939).

destroy, or alienate his property to the detriment of the creditor; the debtor sought to broaden his freedom of action in the use and alienation of his property as much as possible. In the administration of successions, the creditor sought close regulation so that the personal representative, heirs, and legatees could not injure, destroy, or alienate succession property and, thus, leave him without security. The debtor and possible heirs or legatees sought freedom from administration except in cases in which the heirs or legatees might be unable to manage the decedent's property themselves because they were absent or incompetent. If an administration was legally required, the debtor and possible heirs or legatees would favor an administration as loosely regulated as possible so that they and the succession representative could manage the affairs of the decedent without outside interference. If the succession was testate, the executor would probably be a friend of the decedent; if the succession was intestate, the administrator would probably be one of the heirs. The possibility was far greater that the succession representative would injure the creditors than that he would injure the heirs or legatees. The creditors would have nothing to gain from a loosely regulated administration (unless they were in collusion with the executor or administrator).

Most of the population in the southeastern part of the Territory of Orleans lived on the narrow belts of high alluvial land that bordered the streams and rivers.⁶⁰ Behind the occupied land lay uninhabited forest, marsh, and swamp.⁶¹ The settlements on the Red River lay in a fertile valley beyond which were hilly woodlands⁶² with few inhabitants.⁶³ In the most densely populated parts of the Territory⁶⁴ the wilderness was not far away.⁶⁵ Its nearness caused Louisianians to resent legal restraint⁶⁶ and to seek a loosely regulated administration of successions.

The redactors of the Civil Code of 1808, James Brown and Moreau Lislet,⁶⁷ were residents of New Orleans.⁶⁸ Although the

60. See note 13 *supra*.

61. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 7-9 (1939).

62. See *id.* at 10 (Struggle in Louisiana) and inner cover ("Regional Map"); DAVIS, LOUISIANA: THE PELICAN STATE 120 (1959).

63. See DAVIS, LOUISIANA, THE PELICAN STATE 120 (1959).

64. *Ibid.*

65. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 9 (1939).

66. As an example, see SAXON, OLD LOUISIANA 112-13 (1929).

67. See note 28 *supra*.

68. See 1 FORTIER, LOUISIANA (BIOGRAPHICAL EDITION) 132 (1914); 2 *id.* at 71.

evidence does not indicate that they favored one element of society, it is clear that they did not seek to gratify the feudal instincts of the planters. If lawyers from the plantation districts, allied to the planters, had been commissioned to prepare the Civil Code of 1808, the planters' emotional affection for feudalism might have overcome their intellectual advocacy of democracy and a code feudal in nature might have been adopted.

The Louisiana Purchase removed trade difficulties created by Spanish control of the lower Mississippi River⁶⁹ and permitted settlement of the American Middle West through New Orleans.⁷⁰ The growth of commerce upon the Mississippi River⁷¹ caused the Louisianians gradually to become more commercial than feudal in their interests.⁷²

Because the climate of southeastern Louisiana was subtropical, the planters grew sugar cane rather than cotton, although it was more expensive to cultivate than other southern crops.⁷⁴ The importance of commerce to the welfare of the state⁷⁵ and the highly capitalized nature of sugar production⁷⁶ forced the sugar planter to become more commercial in his attitude than other southern planters.⁷⁷

The central struggle between planter and merchant was that of debtor and creditor, or, considered in almost the same manner, that of agriculture and commerce. In drafting the Constitution of 1812, the planter and the merchant had entered into an alliance of the aristocratic and wealthy against the poor and untutored.⁷⁸ In the years following 1820, the planter was induced by the increasing importance of commerce partially to abandon his debtor or agricultural sentiments and to enter into a second political alliance with the merchants of New Orleans favoring a commercial society and the American System of Clay and Adams over an agricultural society.⁷⁹ The American System in-

69. See Liljegen, *Jacobinism in Spanish Louisiana (1792-1797)*, 22 LA. HIST. Q. 47 (1939).

70. See, NAU, *THE GERMAN PEOPLE OF NEW ORLEANS (1850-1900)* 9 (1958).

71. See STANDARD HISTORY OF NEW ORLEANS 560 (Rightor ed. 1900).

72. See SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* 112-13 (1939).

73. See *id.* at 14.

74. See DAVIS, *LOUISIANA: THE PELICAN STATE* 117 (1959).

75. See McLure, *The Elections of 1860 in Louisiana*, 9 LA. HIST. Q. 601 (1926).

76. See MCGINTY, *A HISTORY OF LOUISIANA* 131 (2d ed. 1951).

77. See STANDARD HISTORY OF NEW ORLEANS 560 (Rightor ed. 1900).

78. See note 53 *supra*.

79. See MCGINTY, *A HISTORY OF LOUISIANA* 131 (2d ed. 1951).

volved the discouragement of unsound financial speculation.⁸⁰ The New Orleans merchant and sugar planter combined in seeking greater security for the creditor⁸¹ and a more closely regulated administration of successions.

Although many Americans came to Louisiana in the period before statehood, the number who migrated to Louisiana in the period between 1814 and 1830 was much greater.⁸² Coming from all parts of the eastern seaboard,⁸³ they settled in the southeastern part of the state.⁸⁴ Not all of these settlers resumed their former occupations.⁸⁵ Some who had been laborers, merchants, or small farmers became planters,⁸⁶ but retained the social and political attitudes of their former occupations. Because of their influence, the original Louisiana planters and the newly-arrived planters who had belonged to the landed classes in the east⁸⁷ became more commercial in their point of view. Conversely, some men who had been landowners in the east became merchants in Louisiana.⁸⁸ They lost their former attitudes rather quickly, because Louisiana society was essentially commercial.⁸⁹

The entry of the Americans strengthened the cultural link forged between Louisiana and the United States by the Louisiana Purchase. American lawyers, or Louisianians trained in the Anglo-American law, occupied both bench and bar in many cases tried before the Louisiana courts.⁹⁰

The French Louisianians, in 1803, usually lived on the same farms or plantations or in the same towns all of their lives.⁹¹ The creditor's knowledge of the character, condition, and activities of the population tended to reduce the utility of a closely regulated administration of successions. The movement of the

80. *Ibid.*

81. *Ibid.* See also McLure, *The Elections of 1860 in Louisiana*, 9 LA. HIST. Q. 601 (1926).

82. See DAVIS, *LOUISIANA: THE PELICAN STATE* 117 (1959).

83. *Ibid.*

84. See MCGINTY, *A HISTORY OF LOUISIANA* 141 (2d ed. 1951); SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* 14, 64 (1939).

85. See SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* 31-33 (1939).

86. *Ibid.*

87. *Ibid.*

88. *Ibid.*

89. See MCGINTY, *A HISTORY OF LOUISIANA* 131 (2d ed. 1951); SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* 112-13 (1939).

90. See Introduction to LA. CIVIL CODE OF 1870, at xxiv (Dainow ed. 1947); McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

91. See note 3 *supra*.

Americans into Louisiana after the War of 1812 ended this situation; Louisiana became, in the words of the redactors of the Civil Code of 1825, "a country where there are a great many strangers."⁹² Although the Americans themselves probably resented governmental control,⁹³ their entry made greater regulation of the administration of successions necessary. Louisiana became a land filled with "strangers," in which the creditor might know nothing of the character, condition, or activities of the debtor, his other creditors, or his possible heirs or legatees.

In 1825, the French inhabitants of Louisiana continued to feel a nationalistic preference for the French over the Spanish law. This feeling was reflected in the Civil Code adopted that year, which was much more strongly influenced by the French law than the Digest of 1808 had been.⁹⁴

In the period between 1830 and 1860, a different type of American, the small cotton farmer of the southeastern United States, entered Louisiana⁹⁵ and became the principal element in the free population of the northern part of the state, in which he settled.⁹⁶ Politically a Jacksonian Democrat,⁹⁷ he became the political opponent of the sugar planter and New Orleans merchant, who had become Whigs.⁹⁸

In the lowland areas of the northern part of the state, a plantation system based upon the cultivation of cotton⁹⁹ was gradually developed.¹⁰⁰ The cotton plantations of northern Louisiana did not become as important economically as the sugar plantations in the southeastern part of the state.¹⁰¹

At the same time, immigrants, mostly German and Irish,¹⁰²

92. See LOUISIANA LEGAL ARCHIVES, PROJET OF CIVIL CODE OF 1825, 157 (1937).

93. See TOCQUEVILLE, DEMOCRACY IN AMERICA, *passim* (1889).

94. See Introduction to LA. CIVIL CODE OF 1870, at xxi (Dainow ed. 1947).

95. See MCGINTY, A HISTORY OF LOUISIANA 141 (2d ed. 1951); SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 64 (1939) [hereinafter cited as SHUGG].

96. See note 84 *supra*.

97. See MCGINTY, at 141; SHUGG, at 149.

98. See MCGINTY, at 136.

99. *Id.* at 14.

100. See SHUGG, at 6, 7.

101. In 1860 seventeen percent of the assessed property of the state lay in the alluvial lowlands north of the Red River and sixty percent in the alluvial lowlands south of the Red River. See *id.* at 316. Part of northern Louisiana lies south of the Red River, because the Red River crosses the state diagonally, but most of the alluvial land of northern Louisiana lies north of the Red River. See *id.* inner cover, "Regional Map."

102. *Id.* at 38, 39.

settled in New Orleans in large numbers.¹⁰³ The tide of immigration was so great that in 1850 one-fourth of the population of the state was foreign-born.¹⁰⁴ Most of the immigrants became laborers and were used as pawns by the New Orleans politicians.¹⁰⁵ Feeling no strong ties with the political parties of the state or nation, the Irish in general voted for the Democrats and the Germans for the Whigs.¹⁰⁶

In 1837, when fourteen banks in New Orleans suspended specie payments as a result of the financial crisis of that year,¹⁰⁷ hundreds of farmers and planters lost their lands.¹⁰⁸ The resentment of the sugar planters brought about a temporary weakening of their alliance with the New Orleans merchants. A conflict between friends and foes of the banks developed in the legislative session of 1838.¹⁰⁹ A bill regulating the activities of the banks was introduced and passed over the opposition of the banking interests.¹¹⁰ The bill was vetoed by the Governor, however, and the legislature failed to override his veto.¹¹¹

In 1839 Louisiana banks resumed specie payments.¹¹² The state was flooded with worthless bank notes.¹¹³ In the latter part of 1841 specie payments were again suspended,¹¹⁴ to be resumed again in 1842.¹¹⁵ In 1842 and 1843, the legislature successfully enacted new banking regulations¹¹⁶ that made Louisiana banks the most financially sound in the United States.¹¹⁷

Three times in the 1830's Jacksonian Democrats had introduced resolutions in the legislature for the calling of a constitutional convention. The first two resolutions had been approved by the House, but rejected by the Senate. The third passed both

103. See NAU, *THE GERMAN PEOPLE OF NEW ORLEANS 1850-1900*, at 9-25 (1958).

104. See DAVIS, *LOUISIANA: THE PELICAN STATE* 173 (1959) [hereinafter cited as DAVIS].

105. See SHUGG, at 91, 118, 146-47.

106. *Ibid.*

107. See 3 FORTIER, *A HISTORY OF LOUISIANA* 226 (1904) [hereinafter cited as FORTIER].

108. See DAVIS, at 179.

109. See CALDWELL, *A BANKING HISTORY OF LOUISIANA* 62 (1935).

110. *Ibid.*

111. *Ibid.*

112. See STANDARD HISTORY OF NEW ORLEANS 597 (Rightor ed. 1900) [hereinafter cited as RIGHTOR].

113. See RIGHTOR, at 597.

114. See 3 FORTIER, at 230.

115. See RIGHTOR, at 599.

116. See CALDWELL, *A BANKING HISTORY OF LOUISIANA* 62 (1935).

117. *Ibid.*

Houses but was vetoed by the Governor.¹¹⁸ The financial crisis of 1837 and the accompanying financial distress of the small cotton farmers and sugar planters¹¹⁹ strengthened popular sentiment in favor of Jacksonian Democracy.¹²⁰ In 1841, the Governor signed a resolution for the calling of a constitutional convention.¹²¹

The Constitutional Convention, which met in 1845,¹²² contained twice as many Democrats as Whigs.¹²³ The Democrats were predominantly from the northern and central parishes, the Whigs predominantly from New Orleans and the surrounding southern parishes.¹²⁴ The Constitution that they prepared removed property qualifications for voting¹²⁵ and provided for universal white manhood suffrage.¹²⁶ The distrust the Jacksonian Democrats felt for commerce prompted the convention of 1845¹²⁷ to forbid the legislature's pledging the faith of the state behind private obligations,¹²⁸ to limit the amount of debts that could be legislatively contracted,¹²⁹ to forbid the chartering of banks,¹³⁰ to limit the lives of corporations to twenty-five years,¹³¹ and to limit the lives of legislatively granted monopolies to twenty years.¹³²

In this period, the anti-commercial feelings of small farmers might have caused a less closely regulated administration of successions to be permitted. Although a desire to weaken or to eliminate the commercial characteristics of the law existed,¹³³ few changes were made. The banks of New Orleans were very powerful, having the power to coerce the legislators by refusing to make loans and by calling for the immediate payments of debts.¹³⁴ More important, the emotional force of Jacksonian Democracy was not powerful enough to bring the small farmers to the polls in numbers. Although universal white manhood suf-

118. See SHUGG, at 124.

119. See DAVIS, at 179.

120. See MCGINTY, at 142.

121. See SHUGG, at 124-25.

122. *Id.* at 125.

123. *Ibid.*

124. *Id.* at 126.

125. *Ibid.*

126. La. Const. art. 10 (1845).

127. See SHUGG, at 134.

128. See La. Const. art. 113 (1845).

129. See *id.* art. 114.

130. See *id.* arts. 122, 123.

131. See *id.* art. 124.

132. See *id.* art. 125.

133. See Succession of Christy, 6 La. Ann. 427 (1851).

134. See 4 GAYARRE, HISTORY OF LOUISIANA 660 (4th ed. 1903).

frage was permitted,¹³⁵ few men voted who had not been permitted to vote under the Constitution of 1812.¹³⁶ As a result, the New Orleans merchant-sugar planter coalition regained partial control of the government.¹³⁷

The Jacksonian farmers were disappointed by the failure of the Constitution of 1845 to produce the Democratic changes that they had sought.¹³⁸ A new constitutional convention was called, which met in 1852.¹³⁹ Two-thirds of the delegates being Whigs,¹⁴⁰ the hopes of the small farmers were dashed at the outset.

Although the Constitution of 1852 retained universal white manhood suffrage,¹⁴¹ apportionment of legislative seats in both Houses was made dependent upon total population,¹⁴² rather than white population. Having a larger proportionate Negro population than the other parishes, the plantation parishes, politically dominated by the planters, received a greater number of seats in the legislature than their white population would justify.¹⁴³ Although the Whig party was moribund nationally¹⁴⁴ and declining in influence in Louisiana,¹⁴⁵ the propertied classes whom it had once represented, through the device of "slave representation," regained complete political control of the state.¹⁴⁶

Most of the anti-commercial provisions of the Constitution of 1845 were rejected by the Constitution of 1852. The legislature was permitted to contract debts in unlimited amount,¹⁴⁷ to charter banks,¹⁴⁸ and to make loans to or to subscribe for the stock of companies formed for the making of internal improvements.¹⁴⁹ The provisions of the Constitution of 1845 limiting the lives of corporations and legislatively granted monopolies¹⁵⁰ were repealed by omission.¹⁵¹

135. See La. Const. art. 10 (1845).

136. See SHUGG, at 130-31.

137. *Ibid.*

138. *Id.* at 135.

139. *Id.* at 135, 136.

140. *Id.* at 136.

141. See La. Const. art. 10 (1852).

142. See La. Const. arts. 8, 15, 16 (1852).

143. See SHUGG, at 137-44.

144. See *id.* at 138, 139; McLure, *Elections of 1860*, 9 LA. HIST. Q. 601 (1926).

145. See note 144 *supra*.

146. See SHUGG, at 137-44.

147. See La. Const. art. 111 (1852).

148. See *id.* art. 118.

149. See *id.* arts. 108-110.

150. See La. Const. arts. 124, 125 (1845).

151. See La. Const. (1852).

One token victory was granted the Democrats in the Constitution of 1852. Judgeships, which until 1852 had been appointive,¹⁵² were made elective.¹⁵³ The constitutional change had little effect upon the nature of the men who occupied the bench, because few laborers and small farmers voted.¹⁵⁴

After the victory of the commercial or propertied¹⁵⁵ interests in 1852, the law regulating the administration of successions might have been altered so that commercial conditions would be more fully recognized and commercial interests would be more fully protected. Little change occurred, however. The lower classes, at any moment they might become aroused, could vote in full strength and elect men of their views to office. Even in the plantation parishes, the small farmers outnumbered the planters.¹⁵⁶ It was unlikely that any change in the law governing the administration of successions would, in itself, arouse enough popular resentment to bring the common people to the polls in numbers, but changes in the law governing the administration of successions combined with other legal changes would, if carried beyond a certain unknown point, produce such a result. Fearful of an agrarian revolution by means of the ballot,¹⁵⁷ the upper classes, once they had returned to power, avoided undertaking actions that would arouse class feeling.¹⁵⁸

The alliance between the sugar planter and the New Orleans merchant was precarious. Although the sugar planter acknowledged the practicality of protecting commerce, he was a debtor¹⁵⁹ and a landowner, still emotionally tied to a feudal society¹⁶⁰ that was slowly disappearing. He looked upon commerce as something to be tolerated, not admired. The New Orleans merchant, the planter's creditor,¹⁶¹ was strongly commercial in his attitudes.¹⁶² The two groups were united only by a common acknowledgment of the necessity of protecting commerce¹⁶³ and by a common fear of the small cotton farmer to the north.¹⁶⁴

152. See 3 FORTIER, at 251.

153. See La. Const. arts. 64, 81 (1852).

154. See SHUGG, at 130-31.

155. See McLure, *The Elections of 1860*, 9 LA. HIST. Q. 602 (1926).

156. See SHUGG, at 26.

157. *Id.* at 143.

158. *Id.* at 155, 156.

159. See CALDWELL, *A BANKING HISTORY OF LOUISIANA* 60-61 (1935).

160. See SHUGG, at 117.

161. See CALDWELL, *A BANKING HISTORY OF LOUISIANA* 60-61 (1935).

162. See SHUGG, at 36.

163. See McLure, *The Elections of 1860 in Louisiana*, 9 LA. HIST. Q. 601 (1926).

164. See SHUGG, at 143.

Any action or combination of actions designed to produce greater security for the creditor — *i.e.*, change of the kind that would include a more tightly regulated administration of successions — might upset the finely balanced coalition of merchant and planter and throw the small cotton farmer into control of the state.

The Constitution of 1845 had produced one lasting effect. Before 1845, although no state appropriated more money for public education in proportion to its population than Louisiana,¹⁶⁵ public education on the primary level was inadequate.¹⁶⁶ More than half the money appropriated for public schools was used to subsidize colleges and academies.¹⁶⁷ Very few children attended public primary schools because attendance was considered to stigmatize them as paupers.¹⁶⁸ A more satisfactory system of public education was established by the Constitution of 1845¹⁶⁹ and continued under the Constitution of 1852.¹⁷⁰ Although the schools declined in quality after 1853,¹⁷¹ the education of the lower classes was begun. Their education caused them to become more interested in public affairs and, thereby, to become more powerful politically.

Although Louisiana's great landholdings, slavery, and small cotton farms rendered the state essentially a part of the South, geographical position and population set it apart. Because it lay at the mouth of the Mississippi River, it was more commercial than agricultural in its interests.¹⁷² In 1850, more of its free population engaged in commerce than in agriculture.¹⁷³ In capital its banks exceeded those of New York in the years 1835-1842.¹⁷⁴ Its merchants and sugar planters favored the American system,¹⁷⁵ which most of the South feared and opposed.¹⁷⁶ The Louisiana legislature in 1833 had unanimously adopted a resolu-

165. *Id.* at 69. The first public school legislation in Louisiana was enacted by the legislature of the Territory of Orleans in 1805. See Noble, *Governor Claiborne and the Public School System of the Territorial Government of Louisiana*, 11 LA. HIST. Q. 535 (1928).

166. See SHUGG, at 69.

167. *Ibid.*

168. *Ibid.*

169. See La. Const. arts. 133-139 (1845).

170. See La. Const. arts. 135-140 (1852).

171. See SHUGG, at 74. At one time half of the educable children in the state had attended school; in 1858, only one-third of the children were in school.

172. See *id.* at 112-13.

173. *Id.* at 16.

174. See CALDWELL, *A BANKING HISTORY OF LOUISIANA* 32 (1935).

175. See MCGINTY, *A HISTORY OF LOUISIANA* 131 (2d ed. 1951).

176. See DANGERFIELD, *THE ERA OF GOOD FEELING* 320 (1952).

tion condemning nullification in South Carolina.¹⁷⁷ The population as a whole was somewhat reluctant to support secession in 1860 and 1861 because it feared that secession would disrupt traffic on the Mississippi River.¹⁷⁸ Louisiana was the only former French or Spanish colony in the South in which the French and Spanish still constituted an important cultural element;¹⁷⁹ the better-educated French inhabitants still spoke French, attended the French opera, and read French novels.¹⁸⁰ Many immigrants were present in Louisiana.¹⁸¹ In 1850, one-fourth of the population of the state was foreign-born.¹⁸² Several German newspapers were published in New Orleans;¹⁸³ two, the *Deutsche Zeitung* and the *Staats-Zeitung*, remained in existence for many years.¹⁸⁴ Many Louisianians either had come from the North or were descended from persons who had come from the North.¹⁸⁵ Because Louisiana did not resemble the South completely, it did not fully identify itself with the South. Its thoughts, customs, ideals, and tastes were never completely southern. This absence of complete identification with the South had a noticeable effect upon the Louisiana law, of a negative character. If Louisiana had more fully identified itself with the rest of the South, southern nationalism would have induced it to make greater efforts to produce conformity between its law and that of other southern states.

The influence of the Anglo-American law in Louisiana was strongest in the years between 1870 and 1900,¹⁸⁶ the period in which Louisiana identified itself most fully with the South because of the common experiences of Civil War and Reconstruction. Undoubtedly, feelings of loyalty to the South were partly responsible for the increase in Anglo-American influence in this

177. See 3 FORTIER, at 222; McLure, *The Elections of 1860 in Louisiana*, 9 LA. HIST. Q. 602 (1926).

178. See McLure, *The Elections of 1860 in Louisiana*, 9 LA. HIST. Q. 602 (1926).

179. See SHUGG, at 35.

180. *Ibid.*

181. See, NAU, *THE GERMAN PEOPLE OF NEW ORLEANS 1850-1900*, at 9-25 (1958) [hereinafter cited as NAU].

182. See DAVIS, at 173.

183. See NAU, at 60.

184. See Clark, *The German Liberals in New Orleans (1840-1860)*, 20 LA. HIST. Q. 137 (1937); NAU, at 60.

185. See SHUGG, at 157. In 1850, New Orleans had more residents from New York or Pennsylvania than from any southern state except Louisiana. See Greer, *Louisiana Politics, 1845-1861*, 12 LA. HIST. Q. 381 (1929).

period. After 1900, the influence of the Anglo-American law declined and a movement developed to return to the civil law.¹⁸⁷

In 1864, a constitutional convention met, composed of delegates elected from the parishes that were within Union lines.¹⁸⁸ Union lines at that time contained only Orleans Parish¹⁸⁹ and seventeen rural parishes, most of which were in the southeastern part of Louisiana.¹⁹⁰ Representation was based upon white population rather than upon total population.¹⁹¹ Negroes were not permitted to vote in the election of delegates.¹⁹² Sixty-three delegates, most of whom were allied to the laboring classes, came from New Orleans and thirty-three from the rural parishes.¹⁹³ The Constitution the delegates prepared abolished slavery¹⁹⁴ but restricted the franchise to members of the white race.¹⁹⁵ It directed the legislature to levy an income tax¹⁹⁶ and established minimum wages and maximum hours for laborers employed in public works.¹⁹⁷ Drastic changes might have been made in the civil law if laborers had controlled the first legislature to meet under the new Constitution.

However, the first legislature, which met in 1865, was composed principally of Confederate veterans allied to the merchant-planter coalition.¹⁹⁸ Rather than enacting liberal legislation, it passed a "black code" that made Negroes virtual peons¹⁹⁹ and refused to ratify the fourteenth amendment.²⁰⁰

In February of 1867, the radical wing of the Republican party in Congress passed a bill dividing the former states of the Confederacy, with the exception of Tennessee, which had ratified the fourteenth amendment,²⁰¹ into five military districts.²⁰²

186. See *Introduction to LA. CIVIL CODE OF 1870*, at xxv-xxx (Dainow ed. 1947); McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

187. See McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

188. See 4 FORTIER, at 51.

189. See SHUGG, at 201.

190. *Ibid.*

191. *Id.* at 200.

192. *Id.* at 201.

193. *Ibid.*

194. See La. Const. art. 1 (1864).

195. *Id.* art. 14.

196. *Id.* art. 124.

197. *Id.* arts. 134, 135.

198. See 4 FORTIER, at 72.

199. See SHUGG, at 218.

200. *Ibid.*

201. See 4 FORTIER, at 91-92.

202. *Id.* at 92.

Reconstruction began.²⁰³ A new constitutional convention was called that met in 1867.²⁰⁴ Although a majority of the delegates were Negroes,²⁰⁵ the committee appointed to prepare the new constitution contained five white and four Negro members.²⁰⁶ The members divided by race and submitted separate reports.²⁰⁷

The Negro delegates hoped to break up the landed estates through the constitution that was being prepared.²⁰⁸ If they had succeeded in obtaining the constitutional provisions they sought, great changes might subsequently have been made in the law governing the administration of successions. The Convention, however, rejected the first radical proposal of the Negro delegates.²⁰⁹ Seeing that they could not gain their objectives, the Negro delegates made no further effort to destroy the plantation system.²¹⁰ The radical agrarian wing of the Convention was defeated for two reasons. First, northern conservatives feared that a redistribution of the land in the South would incite northern factory workers to demand a similar redistribution of property in the North.²¹¹ Second, many white delegates to the Convention hoped that they would become owners of plantations.²¹²

The Constitution of 1868 provided for representation on the basis of total population;²¹³ but, unlike the Constitution of 1852, it did not restrict the franchise to the white population.²¹⁴ Confederate veterans and Confederate sympathizers were disenfranchised.²¹⁵ Their franchise was restored in 1870.²¹⁶

The white members of the Reconstruction regime did not try to break up the plantation system;²¹⁷ rather, they sought to ac-

203. *Ibid.*

204. *Id.* at 104.

205. *Ibid.*

206. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 221 (1939) [hereinafter cited as SHUGG].

207. *Ibid.*

208. *Id.* at 243.

209. *Ibid.* The defeated proposal placed a limitation of 150 acres on the amount of land which could be bought at a distress sale.

210. *Id.* at 243-44.

211. *Id.* at 244.

212. *Id.* at 247-49; WARMOTH, WAR, POLITICS, AND RECONSTRUCTION 5-12, 89, 260 (1930).

213. See La. Const. arts. 21, 30 (1868).

214. See *id.* art. 98.

215. See *id.* art. 99.

216. See 4 FORTIER, A HISTORY OF LOUISIANA 113 (1903) [hereinafter cited as FORTIER].

217. See SHUGG, at 243.

quire plantation property and to become planters.²¹⁸ Property taxes were raised to a level that was almost confiscatory.²¹⁹ Fraud was used to acquire succession property.²²⁰ Although the law governing the administration of successions might have been modified so that succession property could be acquired more easily, few changes were made. Succession property could be acquired through the use of devices that were legal or almost legal.²²¹ By 1870, at least half the planters in the sugar parishes were northern men or men who were financed by northern capital.²²² The Reconstruction government did not seek the destruction of wealth.²²³

The northerners who acquired plantations were highly commercial in their attitude.²²⁴ They did not hold the feudal and anti-commercial attitudes²²⁵ that lingered among the planters of the old regime.²²⁶ The whole society without its knowledge and against its will became permeated by their commercial point of view.

In 1877, the Reconstruction government was overthrown and a Democrat, Francis R. T. Nicholls, was installed as Governor.²²⁷ Few changes were made in the civil law, the new government seeking principally to prevent the return to power of the Reconstruction government.

A new Constitution was adopted in 1879.²²⁸ One title was devoted to the limitation of legislative power;²²⁹ the state sought to avoid a repetition of the legislative excesses of the Reconstruction era. Although all men were permitted to vote without racial limitations,²³⁰ soldiers and sailors of the United States stationed in Louisiana were not permitted to acquire domicile in the state.²³¹ Legislative apportionment was to be based upon

218. See note 212 *supra*.

219. See SHUGG, at 228.

220. See *Heirs of Burney v. Ludeling*, 47 La. Ann. 73, 16 So. 507 (1895). Ludeling was Chief Justice of the Supreme Court of Louisiana in the Reconstruction era. See 2 FORTIER, LOUISIANA (BIOGRAPHICAL EDITION) 105 (1914).

221. See *Heirs of Burney v. Ludeling*, 47 La. Ann. 73, 16 So. 507 (1895).

222. See SHUGG, at 249.

223. *Id.* at 243.

224. *Id.* at 248-49.

225. See note 49 *supra*.

226. See SHUGG, at 261.

227. See 4 FORTIER, at 184.

228. *Id.* at 198.

229. See La. Const. arts. 43-57 (1879).

230. See *id.* arts. 184, 185.

231. See *id.* art. 164.

total population.²³² The sugar planter-New Orleans merchant coalition returned to power and continued to govern the state until Huey Long was inaugurated as Governor.²³³

The Populist party became very strong among the lower classes in the 1890's,²³⁴ but it was unable to gain control of the governorship.²³⁵ The fusion of the Populists and the Democrats in the presidential election of 1896 brought about the decline of the Populist movement.²³⁶ The Populists did not offer a candidate for governor after the gubernatorial election of 1900.²³⁷

The power of the merchant-planter coalition was constantly endangered by the vote of the lower classes and the Negro. After the disappearance of the Populist party, the lower classes were without political representation, because none of the factions of the Democratic party represented their views.²³⁸ The enactment of "white supremacy" legislation removed their fear of competition with the Negro and put them into a state of political lethargy.²³⁹

The Constitution of 1898 restricted the franchise to those who could read and write or who owned property, but made an exception in the case of one whose father or grandfather was permitted to vote on January 1, 1867.²⁴⁰ The effect of this provision was to disenfranchise the Negro.²⁴¹

The merchant-planter coalition was then in unchallenged control of the state. Few significant changes in the rules governing the administration of successions were made in this period, however. The feudal attitudes of the sugar planter had gradually disappeared; commercial attitudes were everywhere present among the governing classes. Rules requiring a more closely regulated administration of successions were probably not installed because it was seen that the lower classes could control the government if they were given effective leadership.

232. See *id.* arts. 16, 17.

233. See MCGINTY, A HISTORY OF LOUISIANA 228-52 (2d ed. 1951) [hereinafter cited as MCGINTY].

234. See Daniel, *The Louisiana People's Party*, 26 LA. HIST. Q. 1055 (1943).

235. See MCGINTY, at 235, 237-39, 243.

236. See SINDLER, HUEY LONG'S LOUISIANA 22 (1956) [hereinafter cited as SINDLER].

237. See MCGINTY, at 243, 246.

238. See SINDLER, at 25.

239. *Id.* at 21, 22; Daniel, *The Louisiana People's Party*, 26 LA. HIST. Q. 1055 (1943).

240. See La. Const. art. 197 (1898).

241. See MCGINTY, at 241.

Huey Long aroused the dormant agrarianism of the small farmer and, by his election as Governor in 1928, symbolically achieved a class revolution.²⁴² For the first time since the Constitutional Convention of 1864, the lower classes had obtained the controlling voice in the government.²⁴³ Long obtained the passage of public works legislation²⁴⁴ and legislation giving financial aid to the poor.²⁴⁵ He proposed the "Share Our Wealth" program, under which private fortunes in excess of \$3,000,000.00 were to be liquidated and the proceeds distributed among the members of the lower classes.²⁴⁶ As part of the "Share Our Wealth" program, the legislature repealed a statute providing for the use of the private express trust.²⁴⁷ The small farmer's distrust of commerce was still present.

If Long had not been assassinated,²⁴⁸ he might have pressed for drastic changes in the civil law that would give less protection to the creditor and permit a less rigid administration of successions. Although his immediate political successors were of his political school, they abandoned the most effective elements of his program. They ignored Long's "Share Our Wealth" proposals²⁴⁹ and permitted the passage of an act that re-established the private express trust.²⁵⁰ The agrarian attitudes of the lower classes disappeared under the prosperity they enjoyed after the Second World War. The sweep of commercialism absorbed the Long revolution in its tide.

II. THE LAW ITSELF

In the Anglo-American law, an heir or a distributee is not permitted to renounce an inheritance in the absence of an express statutory provision.²⁵¹ However, a devisee or a legatee is permitted to renounce a devise or a bequest.²⁵² Even if the testamentary gift or the interest in the estate is not renounced, the heir, distributee, devisee, or legatee is not held liable for the

242. See *id.* at 252; SINDLER, at 26, 37.

243. See DAVIS, *LOUISIANA: THE PELICAN STATE* 286 (1959).

244. *Ibid.*

245. See MCGINTY, at 252.

246. See SINDLER, at 84. See also LONG, *EVERY MAN A KING* 293-98 (1933).

247. See SINDLER, at 131; McMahon, *Parties Litigant in Louisiana*, 10 *TUL. L. REV.* 489 (1936).

248. Long was assassinated in 1935. See MCGINTY, at 253.

249. See SINDLER, at 99.

250. See La. Acts 1938, No. 81. See also SINDLER, at 131.

251. See ATKINSON, *WILLS*, § 139 (2d ed. 1953).

252. *Ibid.*

debts of the decedent beyond the decedent's assets.²⁵³ Unless a small-estates statute is in force,²⁵⁴ the personal property of the decedent falls under the judicially regulated administration of a personal representative who has title for purposes of administration.²⁵⁵ In the absence of statute, title to real property passes immediately to the heirs or devisees who take possession without an administration.²⁵⁶ Although formerly in the Anglo-American law real property of the decedent could not be sold to pay debts, this rule has been set aside by statute in all jurisdictions.²⁵⁷

In Louisiana law, an heir or a legatee under universal title can accept the succession, renounce the succession, or accept the succession with benefit of inventory.²⁵⁸ An heir is one who takes the succession if the decedent dies intestate or one who is a universal legatee.²⁵⁹ A universal legatee is one who takes all the property of the decedent, both movable and immovable,²⁶⁰ or one who takes all the property of the decedent after the particular legacies have been discharged.²⁶¹ The decisions of the Louisiana courts are in conflict as to the definition of legatee under universal title; but, by the prevailing view, he is one who takes a fractional proportion of the property of the decedent.²⁶² The legatee under universal title is not an heir,²⁶³ but he is subject to most of the rules that govern heirs.²⁶⁴ The particular legatee, one who is not a universal legatee or a legatee under universal title,²⁶⁵ is not an heir²⁶⁶ and is not subject to the rules governing heirs.²⁶⁷

253. See Rheinstein, *European Methods for the Liquidation of Debts of the Deceased Persons*, 20 IOWA L. REV. 431 (1935).

254. See SIMES & FRATCHER, *FIDUCIARY ADMINISTRATION* 42-48 (2d ed. 1956).

255. See McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

256. See ATKINSON, *WILLS* § 139 (2d ed. 1953). In many jurisdictions an administration of real property is required by statute.

257. *Ibid.*

258. See LA. CIVIL CODE arts. 976, 977, 988, 1014, 1015, 1017, 1032, 1058 (1870); LA. CODE OF CIVIL PROCEDURE arts. 3001, 3361, 3362, 3371, 3372 (1960).

259. See LA. CIVIL CODE art. 884 (1870).

260. See *id.* art. 1606.

261. See *Pironi v. Riley*, 39 La. Ann. 302, 1 So. 675 (1887); *Eskridge v. Farrar*, 30 La. Ann. 718 (1878); *Sarce v. Dunoyer's Executor*, 11 La. 220 (1837).

262. See *Gregory v. Hardwick*, 218 La. 346, 49 So.2d 423 (1950); *Succession of Meyer*, 198 La. 53, 3 So.2d 273 (1941); *Compton v. Prescott*, 12 Rob. 56 (La. 1845). See also *Succession of Chedome*, 34 La. Ann. 1239 (1882); *cf.* LA. CIVIL CODE art. 1612 (1870).

263. See *Succession of Price*, 197 La. 579, 2 So.2d 29 (1941).

264. See LA. CIVIL CODE arts. 1430, 1613-1615 (1870).

265. See *id.* art. 1625.

266. See *id.* art. 884; *Lacey v. Newport*, 3 La. Ann. 226 (1848).

267. See LA. CIVIL CODE arts. 1430, 1626-1643 (1870).

Title to and possession of both movable and immovable property pass to the heir immediately upon the death of the decedent under the doctrine of *le mort saisit le vif*.²⁶⁸ If the heir accepts the succession unconditionally,²⁶⁹ the succession does not fall under administration.²⁷⁰ There are two exceptions to this general rule. If the succession is not relatively free from debt and the creditors demand an administration, the judge may, in his discretion, require an administration although the heir has accepted unconditionally.²⁷¹ Also, if the creditor or particular legatee demands security within three months after the rendering of the judgment of possession, the judge may, in his discretion, require the heir to furnish security.²⁷² Should the heir fail to furnish security upon his being ordered to do so, the judgment of possession is annulled and the succession is placed under administration.²⁷³ The heir who accepts the succession unconditionally is held personally liable for the debts of the decedent, even beyond the value of the property he has received from the succession.²⁷⁴ The creditor of the decedent who fails to demand security or to bring an action appropriate to the enforcement of his claim within three months after a judgment of possession has been rendered ranks no higher than the creditor of the heir with respect to the decedent's assets.²⁷⁵

268. See *id.* arts. 940-949; *Tulane University v. Board of Assessors*, 115 La. 1025, 40 So. 445 (1905); *cf.* *State v. Brown*, 32 La. Ann. 1020 (1880). Although the universal legatee is an heir, he is invested with title and possession immediately upon the death of the testator only if the testator has left no forced heirs or if the testator's forced heirs have been legally disinherited. See LA. CIVIL CODE arts. 1607-1610 (1870).

269. See note 258 *supra*.

270. See LA. CIVIL CODE arts. 976-1013 (1870); LA. CODE OF CIVIL PROCEDURE arts. 3001-3006, 3031, 3032 (1960); *Succession of Land*, 212 La. 97, 31 So. 2d 607 (1947); *Griffing v. Taft*, 151 La. 442, 91 So. 832 (1922); *Scott v. Briscoe*, 36 La. Ann. 278 (1884); *Succession of Walker*, 32 La. Ann. 321 (1880); *Freret v. Heirs of Freret*, 31 La. Ann. 506 (1879); *Succession of Dunford*, 25 La. Ann. 56 (1873); *Succession of Dupuy*, 4 La. Ann. 570 (1849); *Succession of Ducloslange*, 1 La. Ann. 181 (1846); *cf.* *Succession of Serres*, 135 La. 1005, 66 So. 342 (1914), repudiated by LA. CODE OF CIVIL PROCEDURE art. 3031 (1960).

271. See LA. CODE OF CIVIL PROCEDURE arts. 3004, 3031 (1960).

272. See *id.* arts. 3007, 3034, 3035.

273. See *id.* arts. 3008, 3034, 3035.

274. See LA. CIVIL CODE arts. 1422-1432, 1611, 1614 (1870); *Lawrence v. Lawrence*, 172 La. 587, 134 So. 753 (1931); *Kelly v. Giles*, 167 La. 287, 119 So. 51 (1928); *Satcher v. Radesich*, 153 La. 468, 96 So. 35 (1923); *Claudel v. Palao*, 28 La. Ann. 872 (1876); *Sevier v. Sargent*, 25 La. Ann. 220 (1873); *Fowler v. Succession of Gordon*, 24 La. Ann. 270 (1872); *James v. Hynson*, 21 La. Ann. 566 (1869); *McMasters v. Place*, 8 La. Ann. 431 (1853); *Gaennie v. Thompson*, 6 La. Ann. 475 (1851).

275. See LA. CODE OF CIVIL PROCEDURE arts. 3007, 3008, 3034 (1960); LA. R.S. 9:5011-9:5016 (1950); *Sevier v. Gordon*, 29 La. Ann. 440 (1877); *Fowler v. Succession of Gordon*, 24 La. Ann. 270 (1872); *Beck v. Beck*, 181 So. 635 (La. App. 2d Cir. 1938).

If the heir accepts with benefit of inventory, the succession, in all cases, falls under administration.²⁷⁶ The creditor of the decedent retains his preferred position with respect to the assets of the decedent during administration, but the liability of the heir is limited to the assets that he receives from the decedent.²⁷⁷

If the heir renounces the succession, he is not held liable for the debts of the decedent.²⁷⁸ His renunciation relates back to the date of death.²⁷⁹ The creditors of the heir may accept the succession with benefit of inventory if the heir has renounced it to their detriment.²⁸⁰

Following the example of Spanish law,²⁸¹ the Civil Code of 1808 did not permit the heir to go into possession until he had judicially accepted the succession.²⁸² The French doctrine of *le mort saisit le vif*²⁸³ was substituted in the Civil Code of 1825.²⁸⁴ The requirement that an heir perform a judicial act of acceptance before receiving title violated the spirit of the times. Living near the wilderness, the heir resented judicial interference in his affairs.²⁸⁵ And the French Louisianian, loyal to things that were French,²⁸⁶ preferred the French manner of treatment of legal problems to the Spanish even without considering appropriateness or effect.

Under the Civil Code of 1808, if an intestate succession was accepted with benefit of inventory, all the heirs were permitted to administer the succession without judicial appointment and with little judicial interference,²⁸⁷ as they were in the French

276. See LA. CODE OF CIVIL PROCEDURE arts. 3081-3159, 3361-3395 (1960).

277. See LA. CIVIL CODE art. 1054 (1870); McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

278. See LA. CIVIL CODE art. 946 (1870).

279. *Ibid.*

280. See LA. CIVIL CODE arts. 1021, 1071-1074 (1870).

281. See 1 LOUISIANA LEGAL ARCHIVES, PROJET OF CIVIL CODE OF 1825, at 115 (1937).

282. *Ibid.*; Oppenheim, *An Introduction to the Louisiana Law of Successions*, 4 LA. STAT. ANN. CIVIL CODE 1 (West 1952).

283. See FRENCH CIVIL CODE arts. 1004, 1006, 1011, 1014; Rheinstein, *European Methods for the Liquidation of Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935).

284. See LA. CIVIL CODE art. 934 (1825); O'Donald v. Lobdell, 2 La. 299 (1831).

285. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 9 (1939) [hereinafter cited as SHUGG].

286. See Flory, *Edward Livingston's Place in Louisiana Law*, 19 LA. HIST. Q. 528 (1936).

287. See LA. CIVIL CODE art. 104, p. 168 (1808); Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 TUL. L. REV. 43 (1958).

law.²⁸⁸ This system of administration was in keeping with the popular desire to be free from judicial restraint²⁸⁹ and with the planter's private sense of family continuity.²⁹⁰ With the entry of the Americans, the state became a land of "strangers."²⁹¹ It was impractical to permit all heirs to administer because all heirs often were not present. Greater judicial supervision of the administration of successions became necessary because creditors of the decedent, often ignorant of the conduct or even the identity of the heirs, could be harmed by their uncontrolled actions. The redactors of the Civil Code of 1825 were compelled to follow the example of the Anglo-American law²⁹² in providing for a closely regulated administration of intestate successions and for the judicial selection and appointment of administrators.²⁹³

Under the Civil Code of 1808, the heir could elect to accept the succession unconditionally without administration and thereby take possession before paying the debts of the decedent.²⁹⁴ This practice subjected the decedent's creditor to peril. Partial protection was afforded the creditor by the action for the separation of patrimony,²⁹⁵ which, however, could be brought only within a limited time.²⁹⁶ By the separation of patrimony the

288. See FRENCH CIVIL CODE art. 803; 7 BAUDRY-LACANTINERIE ET COLIN, *TRAITÉ DE DROIT CIVIL* n° 1318 (3d ed. 1905); 2 DALLOZ, *CODES ANNOTÉS (NOUVEAU CODE CIVIL)* art. 603, n° 37 (1911); 3 DEMOLOMBE, *SUCCESSIONS* n° 228 (1879); 3 MARCADÉ, *EXPLICATION DU CODE CIVIL* n° 260 (7th ed. 1873); 3 PLANIOL, *DROIT CIVIL* n° 2122, 2126 (11th ed. 1939); 4 TOULLIER, *LE DROIT CIVIL FRANÇAIS* n° 369-95 (6th ed. 1846).

289. See SHUGG, at 9.

290. See note 49 *supra*.

291. See 1 LOUISIANA LEGAL ARCHIVES, *PROJET OF CIVIL CODE OF 1825*, at 157 (1937).

292. See SHUGG, at 31-33.

293. See La. Civil Code arts. 1042, 1088-1203 (1825).

294. See La. Civil Code art. 72, p. 160 (1808).

295. See *id.* arts. 230-235, p. 202.

296. See *id.* art. 233, p. 202. The action for the separation of patrimony could be brought within three years after the opening of the succession with respect to movables and so long as the heir retained possession with respect to immovables under the Civil Code of 1808. In the Civil Code of 1825 the time within which the action for the separation of patrimony could be brought was reduced to three months from the date of acceptance by the heirs. This period applied to both movable and immovable effects. See La. Civil Code art. 1409 (1825). The redactors indicate that the 1808 rule restricted alienation in an unduly severe manner. See 1 LOUISIANA LEGAL ARCHIVES, *PROJET OF CIVIL CODE OF 1825*, at 198 (1937). The separation of patrimony, as such, has now been eliminated from Louisiana law. See La. CODE OF CIVIL PROCEDURE arts. 3007, 3008, 3035 (1960); LA. R.S. 9:5011-5016 (1950). Under LA. R.S. 9:5011-5016 (1950), the statutory substitute for the separation of patrimony, the creditor of a succession has a privilege on all the property of the decedent which he enjoys for three months after the decedent's death. If an affidavit of the claim is filed for recordation in the mortgage records of a parish in which immovable succession property is

property that the unconditional heir received from the decedent was separated from the other property of the heir so that the creditor of the decedent would be preferred to the creditor of the heir as to the decedent's assets.²⁹⁷ In a land of "strangers" the creditor of the decedent might not know of his debtor's death and thus fail to bring the action for the separation of patrimony within the required time. This danger was offset by the rule that the heir by his unconditional acceptance of the succession made himself liable for the debts of the decedent out of his own assets although the decedent was insolvent.²⁹⁸ The heir did not consider his being held personally liable for the debts of the decedent unjust because the strength of family ties caused him to feel that the child (who was in most cases the heir) should be required to pay the debts of his parents. Because in 1808 vast areas of land were unoccupied and fortunes were easily made,²⁹⁹ it was quite possible that the heir would be wealthy although the decedent was insolvent. The gamble to which the creditor was subjected by the heir's election to accept unconditionally without administration could not be considered unfair.

By 1825 the gamble had become less fair because fortunes could not be acquired so quickly. And society had become more willing to consent to regulation. To reduce the risk to the creditor inherent in the unconditional acceptance, the Civil Code was altered in 1825 and 1828 to provide that the creditor of the decedent could demand security from the heir accepting unconditionally and that the succession would be placed under administration if security was not furnished.³⁰⁰ Yet, because the planter retained (in a weakened form) the outlook of a debtor and the instincts of a feudal proprietor, and because the gen-

situated within this time, the creditor can bring an action to enforce the privilege with respect to immovable property until three months after a judgment of possession not preceded by an administration has been rendered or until three months after the claim has been recorded (if the succession has not been opened judicially), although more than three months have passed since the decedent died. The statute does not state whether the life of the privilege with respect to movables may be extended in a similar fashion by the filing of an affidavit of the claim.

297. See La. Civil Code art. 230, p. 202 (1808). The creditors of the heir could demand a corresponding separation of estates. See *id.* art. 233, p. 202. For the history of the rights of legatees, see La. Civil Code art. 1402 (1825); the identical LA. CIVIL CODE art. 1449 (1870); and LA. R.S. 9:5011, 9:5013-5015 (1950), which replaced article 1449 by virtue of La. Acts 1960, Nos. 30, § 2, and 31, § 5.

298. See La. Civil Code art. 86, p. 164 (1808).

299. See SHUGG, at 31, 32.

300. As to intestate successions, see La. Civil Code art. 1005 (1825). As to testate successions, see La. Acts 1828, No. 83, § 15.

eral population still sought to be free from legal restraint, the unconditional acceptance, thus modified, was retained.

In time the planters lost their feudal attitudes. The unoccupied swamps and forests gradually became settled. Commercialism, though not the commercial coalition of sugar planter and New Orleans merchant, triumphed. But the desire to be free from restraint did not disappear, although it lost intensity. Influenced by the Anglo-American rule requiring an administration of personalty in all cases³⁰¹ and by prevailing conditions, the redactors of the Code of Civil Procedure of 1960 retained the unconditional acceptance³⁰² but provided that if the succession was heavily indebted and the creditors demanded an administration, an administration would be ordered although the heirs accepted the succession unconditionally.³⁰³ Unconditional acceptance being identified with absence of administration, this provision represents a radical departure from civilian principles because it in effect gives the creditor the power to decide whether the heir will accept unconditionally.

The Civil Code of 1808 permitted the testamentary executor or the heirs administering an intestate succession to administer all the property contained within the succession rather than merely the movable property.³⁰⁴ Louisiana, in 1808, could have followed the Anglo-American law, which permitted only personalty to fall under administration,³⁰⁵ or the French law, which limited the seizin of the executor to movable property.³⁰⁶ Either was in accord with the landowner's sense of the mystic power of land.³⁰⁷ Rather, the Code of 1808 provided that both movables and immovables were to fall under administration. Because of his intellectual faith in democracy,³⁰⁸ the Louisiana planter rarely tried to impress his feudal attitudes upon the civil law.

The Civil Code of 1825 required that testate and intestate successions be administered if one or more of the heirs claimed

301. See McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960) [hereinafter cited as McMahon].

302. See LA. CODE OF CIVIL PROCEDURE arts. 3001, 3031 (1960).

303. See *id.* arts. 3004, 3031.

304. See La. Civil Code art. 104, p. 168, art. 166, p. 244 (1808).

305. See McMahon, at 1.

306. See FRENCH CIVIL CODE art. 1026.

307. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 724 (5th ed. 1956).

308. See MCGINTY, at 131.

the benefit of inventory.³⁰⁹ This requirement was weakened by judicial decisions in two respects. First, the rule was developed that an intestate succession accepted with benefit of inventory could not be placed under administration unless an administration was demanded by the creditors.³¹⁰ The rule later was modified to make the placing of the succession under administration discretionary with the trial judge if the creditors did not demand an administration.³¹¹ Second, the courts held that the tutor of a minor heir could administer an intestate succession without special appointment unless the creditors demanded the appointment of a true administrator.³¹² The courts, in the adoption of both rules, were influenced by the desire of the Louisianians to achieve simplicity in legal relationships.

The adoption of the rule that made it mandatory to appoint an administrator of an intestate succession accepted under benefit of inventory only if the creditors demanded an administration appears to have been stimulated by an additional factor. In the Roman law, if the heir did not renounce the succession, he received all the property and rights of the decedent and became liable for all his debts.³¹³ This doctrine of universal succession was modified by the Emperor Justinian, by whom a third course was opened to the heir. He could have an inventory taken of the decedent's assets and thereby restrict his liability for the decedent's debts to the assets that he received. Even if an inventory was taken, the succession did not fall under admin-

309. See LA. CIVIL CODE arts. 1034, 1653 (1825).

310. See Succession of Weincke, 118 La. 206, 42 So. 776 (1907); Succession of Lamm, 40 La. Ann. 307, 4 So. 450 (1888); Succession of Walker, 32 La. Ann. 321 (1880); Succession of Story, 3 La. Ann. 502 (1848); Bryan v. Atchison, 2 La. Ann. 462 (1847). The cases cited state that LA. CODE OF PRACTICE art. 967 (1870) and LA. CIVIL CODE art. 1041 (1870) were in conflict and that the former controlled. The supposed conflict, it appears, could have been resolved by holding that Civil Code article 1041 required the appointment of an administrator after the inventory had been made and Code of Practice article 967 required the court to appoint an administrator even before an inventory had been made if the creditors demanded the appointment of an administrator. Cf. In the Matter of Estate of Lewis, 32 La. Ann. 385 (1880); State v. Heirs of Leckie, 14 La. Ann. 641 (1859).

311. See Succession of Perot, 223 La. 412, 65 So. 2d 895 (1953); Succession of Land, 212 La. 97, 31 So. 2d 607 (1947); Succession of Davis, 184 La. 969, 168 So. 118 (1936); Succession of Comeau, 158 La. 370, 104 So. 119 (1925).

312. See State *ex rel.* Jones v. City of Shreveport, 33 La. Ann. 1247 (1881); Soye v. Price, 30 La. Ann. 93 (1878); Erwin v. Orillion, 6 La. 205 (1834); Succession of Reed, 157 So. 765 (La. App. 1934); cf. Arthur v. Cochran, 12 Rob. 41 (La. 1845); Self v. Morris, 7 Rob. 24 (La. 1844).

313. See 7 BAUDRY-LACANTINERIE ET COLIN, TRAITÉ DE DROIT CIVIL n° 117 (3d ed. 1905); Rheinstein, *European Methods for the Liquidation of Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935); Comment, 22 TUL. L. REV. 87 (1953).

istration.³¹⁴ The doctrine of universal succession in France was modified by the concept of the administration of successions, of Germanic origin.³¹⁵ A conflict within the law was produced. Theories can be developed that logically reconcile the doctrine of universal succession with the concept of administration, but the conflict in spirit remains irreconcilable. As a result, no theory explaining the relationship between the doctrine of universal succession and the concept of administration has consistently been held.³¹⁶ The Louisiana courts, in adopting the rule that an administration of an intestate succession accepted with benefit of inventory was mandatory only if the creditor demanded an administration favored the doctrine of universal heirship over the concept of administration.

The Code of Civil Procedure appears to require the appointment of an administrator of a succession accepted under benefit of inventory in all cases,³¹⁷ although no express statement to this effect is given. The acceptance of this requirement represents, first, a victory of the forces pressing for security for the creditor over the forces pressing for freedom from judicial restraint and, second, a victory of the Anglo-American³¹⁸ and Germanic tendency to favor administration over the Roman tendency to favor universal heirship.

The French Civil Code provided that the testamentary executor would have seizin (or roughly possession)³¹⁹ only if it was given him by will³²⁰ and that the executor's seizin was to last for only one year.³²¹ An executor who was not vested with seizin was almost powerless.³²² The same provisions were included in the Louisiana Digest of 1808.³²³ The substitution was forbidden in the French law³²⁴ and both the substitution and the *fidei com-*

314. See note 313 *supra*.

315. See 5 DEMOLOMBE, TRAITÉ DES DONATIONS n° 1 (1880); 14 LAURENT, PRINCIPES DE DROIT CIVIL FRANCAIS n° 375 (1875); Rheinstein, *European Methods for the Liquidation of Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935).

316. See Comment, 15 TUL. L. REV. 576 (1941).

317. See LA. CODE OF CIVIL PROCEDURE arts. 3001-3394 (1960).

318. See McMahon, at 1.

319. See 3 PLANIOL, DROIT CIVIL n° 2817-2820 (11th ed. 1939).

320. See FRENCH CIVIL CODE art. 1026; 3 PLANIOL, DROIT CIVIL nos 2820-2830 (11th ed. 1939).

321. See FRENCH CIVIL CODE art. 1026; 2 DALLOZ, CODES ANNOTÉS (NOUVEAU CODE CIVIL) art. 1026, n° 6, 14 (1911); 5 DEMOLOMBE, TRAITÉ DES DONATIONS n° 47 (1880); 5 TOULLIER, LE DROIT CIVIL FRANCAIS n° 581 (6th ed. 1846-48).

322. See 3 PLANIOL, DROIT CIVIL n° 2030 (11th ed. 1939).

323. See LA. Civil Code arts. 166, 167, p. 244 (1808).

324. See FRENCH CIVIL CODE art. 896.

missum were forbidden in the law of Louisiana. If the executor was permitted to hold immovable succession property for an indefinite time after the death of the decedent, he would, by his continued holding of the succession property, achieve in some degree the results that would be achieved by the substitution. To discourage such action by the executor, the redactors of the Code Napoleon limited the period during which he could have seizin to one year. They further reduced the possibility of using the executor's office in this manner by providing that he could have seizin only if it was given him by the decedent's will. The redactors of the Civil Code of 1808, sensing the private feudal sentiments of the planters, adopted the French system of permitting the executor to have seizin only if it was given him by will and, then, only for one year. It later became clear that the civil law would not be used as a device to serve feudal ends in Louisiana. The Louisiana courts, therefore, gradually obliterated the distinctions made by the Civil Code between executors with seizin and executors without seizin and, in effect, gave all executors almost full powers of administration.³²⁵ In the Code of Civil Procedure the concept of seizin, as it applies to the executor, is eliminated and all executors are given full powers of administration.³²⁶ This provision represents merely a codification of the judicial blurring out of the concept of seizin as it applies to executors.³²⁷

In the Anglo-American law all personalty of the decedent falls under administration.³²⁸ Life insurance policies upon the life of the decedent do not fall under administration unless they are payable to his estate.³²⁹ Under the law of Louisiana, if the succession is administered, all property of the decedent, both movable and immovable, falls under administration.³³⁰ The pro-

325. *Gregory v. Hardwick*, 218 La. 346, 49 So.2d 423 (1950); *Succession of Futch*, 207 La. 807, 22 So.2d 125 (1945); *Succession of Patterson*, 188 La. 113, 175 So. 320 (1937); *Martin v. Himel*, 174 La. 281, 140 So. 478 (1932); *Flanagan v. Land Development Co.*, 145 La. 843, 83 So. 39 (1919); *Succession of Kaiser*, 48 La. Ann. 973, 20 So. 184 (1896); *Succession of Townsend v. Sykes*, 38 La. Ann. 859 (1886); *Succession of Ames*, 33 La. Ann. 1317 (1881); *Florsheim Bros. v. Holt*, 32 La. Ann. 133 (1880); *Succession of Harris*, 29 La. Ann. 743 (1877); *Livingston v. Gausson*, 21 La. Ann. 286 (1869); *Succession of Wederstrandt*, 19 La. Ann. 494 (1867); *Meissonier v. Laurent*, 14 La. Ann. 14 (1859); *Succession of Boyd*, 12 La. Ann. 611 (1857); *Succession of Cresswell*, 8 La. Ann. 122 (1853); *Succession of Macarty*, 3 La. Ann. 517 (1848); *Dunlap v. Bailey*, 7 La. 368 (1834).

326. See LA. CODE OF CIVIL PROCEDURE art. 3211 (1960).

327. *Ibid.*

328. See ATKINSON, WILLS no. 116 (2d ed. 1953).

329. *Ibid.*

330. See LA. CIVIL CODE arts. 872, 873 (1870).

ceeds of life insurance upon the life of the decedent, by judicial decision, do not fall under administration unless the succession is made the beneficiary.³³¹ The rule represents a recognition that one of the basic motives for taking life insurance is the desire to provide the family with money immediately upon the death of the policy holder. The source of the Louisiana rule appears to be the Anglo-American law.³³² The widow's share of the marital community falls under administration in Louisiana if the deceased husband's succession is administered.³³³ This arrangement appears to have been made because it was considered impractical for the succession representative to administer property in indivision.

A substantial inter vivos gift made by the decedent to his child is presumed in the Anglo-American law to be an advancement.³³⁴ The presumption may be rebutted by parol evidence.³³⁵ If it is not established that a gift is not an advancement, the child cannot share in the estate unless he returns the property given him to the estate or agrees to permit his interest in the estate to be diminished by the value of the gift.³³⁶ This real or fictitious return to the estate of property given the child is called "bringing into hotchpot."³³⁷

In the French law and Louisiana law it is presumed that the donor of an inter vivos gift³³⁸ made to a forced heir in the descending line intended the gift should be subject to collation.³³⁹

331. See Succession of Rabouin, 201 La. 227, 9 So. 2d 529 (1942); Succession of Bofenschen, 29 La. Ann. 711 (1877); Succession of Hearing, 26 La. Ann. 326 (1874).

332. See note 331 *supra*.

333. See Henderson's Estate v. Commissioner of Internal Revenue, 155 F.2d 310 (5th Cir. 1946); Succession of Bertrand, 123 La. 784, 49 So. 524 (1909).

334. See ATKINSON, WILLS § 129 (2d ed. 1953); RICHIE, ALFORD & EFFLAND, DECEDENTS' ESTATES AND TRUSTS 60 (1955).

335. See note 334 *supra*.

336. See note 334 *supra*.

337. See note 334 *supra*.

338. See LA. CIVIL CODE arts. 1231, 1235 (1870). It was first held that, under these articles, testamentary gifts, as well as donations inter vivos, were subject to collation. See Succession of Williams, 132 La. 865, 61 So. 852 (1913); Succession of Ford, 130 La. 442, 58 So. 141 (1912). However, these cases were later overruled, it being held that the articles cited were faultily drafted and that collation applied only to inter vivos gifts. See Doll v. Doll, 206 La. 550, 19 So. 2d 249 (1944); Succession of Meyer, 198 La. 53, 3 So. 2d 273 (1941); Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929). A similar problem arose because of the improper drafting of article 843 of the Code Napoleon, which seemed to indicate that donations mortis causa were subject to collation. Article 843 was amended in 1898 so that it would become clear that collation applied only to donations inter vivos. See Jordan v. Filmore, *supra*; Comment, 26 TUL. L. REV. 203 (1953).

339. LA. CIVIL CODE arts. 1227-1230, 1235, 1236, 1244, 1245 (1870); FRENCH

This presumption may be rebutted by the affirmative statements of the donor.³⁴⁰ Any forced heir in the descending line may bring an action for collation if he has accepted the succession or claimed the benefit of inventory.³⁴¹ The forced heir can exempt himself from collation by renouncing the succession.³⁴² Collation may be made by returning the actual gift to the mass of the succession or by fictitiously returning the gift and permitting the donee's share of the succession to be reduced by the amount of the gift.³⁴³ The concepts of hotchpot and collation are much alike. The Louisiana courts had no reason, so far as the effect of the systems was concerned, to abandon the rules of collation and to adopt the rules of hotchpot. Although confusion might have arisen as a result of the similarity of the systems, confusion did not arise. Perhaps the concepts are too similar to be confused.

Statutes have been enacted in most Anglo-American jurisdictions that set forth grounds for the disqualification of executors and administrators.³⁴⁴ The courts tend to enforce these statutes more rigorously upon the administrator than upon the executor because the executor is chosen by the decedent.³⁴⁵ In Louisiana law, before the adoption of the Code of Civil Procedure, there were no grounds in code or statute for the disqualification of the succession representative.³⁴⁶ An early case involving the point held that the succession representative was not disqualified unless he was one whom the law declared infamous.³⁴⁷ The Code of Civil Procedure sets forth grounds for the disqualification of the succession representative in the manner of statutes in Anglo-

CIVIL CODE arts. 843, 852, 857; Succession of Anderson, 231 La. 195, 91 So. 2d 8 (1956); Succession of Gomez, 223 La. 859, 67 So. 2d 156 (1953); Doll v. Doll, 206 La. 550, 19 So. 2d 249 (1944); Champagne v. Champagne, 125 La. 408, 51 So. 440 (1910); Montgomery v. Chaney, 13 La. Ann. 207 (1858).

340. See LA. CIVIL CODE arts. 1232, 1233 (1870); Gonsoulin v. Gonsoulin, 138 La. 941, 70 So. 919 (1916); Doll v. Doll, 206 La. 550, 19 So. 2d 249 (1944); Darby v. Darby, 118 La. 328, 42 So. 953 (1907); Succession of Weber, 110 La. 674, 34 So. 731 (1901); Montgomery v. Chaney, 13 La. Ann. 207 (1858); cf. FRENCH CIVIL CODE art. 919.

341. See LA. CIVIL CODE arts. 1228, 1235 (1870); FRENCH CIVIL CODE arts. 843, 857.

342. See LA. CIVIL CODE art. 1237 (1870); FRENCH CIVIL CODE art. 845.

343. See LA. CIVIL CODE arts. 1242, 1251-1288 (1870); FRENCH CIVIL CODE arts. 850, 858-868; Succession of Gomez, 223 La. 859, 67 So. 2d 156 (1953); *In re Andrus*, 221 La. 996, 60 So. 2d 899 (1952).

344. See *In re Will of Cohen*, 164 Misc. 98, 298 N.Y. Supp. 368 (1937); ATKINSON, WILLS §§ 108, 110, 111 (2d ed. 1953); SIMES & FRATCHEE, FIDUCIARY ADMINISTRATION 100, 101, n.24 (2d ed. 1956).

345. See note 344 *supra*.

346. See LA. CODE OF CIVIL PROCEDURE art. 3097 (1960).

347. See *Rust v. Randolph*, 5 Mart.(O.S.) 89 (La. 1817).

American jurisdictions.³⁴⁸ The adoption of code grounds for disqualification gives greater protection to the creditor; the adoption was brought about by the growing awareness of the commercial nature of Louisiana society.

In all Anglo-American states an order of priority in coming to the administration is set forth by statute.³⁴⁹ The Louisiana Civil Code of 1808 did not contain an order of priority because all beneficiary heirs administered the succession.³⁵⁰ In the Civil Codes of 1825 and 1870 and in the Code of Civil Procedure, an order of priority in the selection of the administrator is given.³⁵¹ An order of priority appears to have been introduced into the Civil Code of 1825 because it was necessary to provide an order of priority in coming to the administration if there was to be a judicially appointed administrator.³⁵²

Letters of administration or letters testamentary are issued to the personal representative upon his appointment by the court in the Anglo-American law.³⁵³ Although in Louisiana no provision in code or statute directed the issuance of letters testamentary or letters of administration,³⁵⁴ their issuance became a

348. See LA. CODE OF CIVIL PROCEDURE art. 3097 (1960); cf. SIMES, MODEL PROBATE CODE § 96(6) (1946).

349. ATKINSON, WILLS § 109 (2d ed. 1953); SIMES & FRATCHER, FIDUCIARY ADMINISTRATION 95-97 (2d ed. 1956).

350. See La. Civil Code art. 104, p. 168 (1808).

351. See La. Civil Code arts. 1035-1039 (1825); LA. CIVIL CODE arts. 1042-1046 (1870); LA. CODE OF CIVIL PROCEDURE art. 3098 (1960). The trial judge, within the members of the same class, was given rather broad discretion in the selection of an administrator. See Succession of Brown, 214 La. 377, 37 So. 2d 842 (1948); Succession of Eberle, 155 La. 603, 99 So. 464 (1924); Succession of Gaines, 42 La. Ann. 699, 7 So. 788 (1890); Succession of Boudreaux, 42 La. Ann. 296, 7 So. 453 (1890); Succession of Chaler, 39 La. Ann. 308, 1 So. 820 (1887); Succession of Martin, 13 La. Ann. 557 (1858); cf. Succession of Beraud, 21 La. Ann. 666 (1869). He could not, however, prefer someone of an inferior class. See Succession of Virgets, 182 La. 491, 162 So. 53 (1935); Succession of Rabe, 163 La. 149, 111 So. 658 (1927); Succession of Bulliard, 111 La. 186, 35 So. 508 (1903); Succession of Romero, 42 La. Ann. 894, 8 So. 632 (1890); Succession of Picard, 33 La. Ann. 1135 (1881); Succession of Sloane, 12 La. Ann. 610 (1857); Succession of Penney, 10 La. Ann. 290 (1855); Succession of Petit, 9 La. Ann. 207 (1854); Succession of Eugene, 10 La. App. 294 (Orl. Cir. 1929); cf. Succession of Barber, 52 La. Ann. 957, 27 So. 361 (1900); Succession of Kalish, 143 So. 524 (La. App. 1st Cir. 1932). These rules were, by judicial decision, made applicable in the selection of the dative executor (the executor whom the court appoints if no executor is appointed by will or if the executor appointed by will is discharged or is unwilling or unable to serve). See Succession of Kneipp, 172 La. 411, 134 So. 376 (1931); Succession of Gusman, 36 La. Ann. 299 (1884); Girod's Heirs and Legatees v. Girod's Executors, 18 La. Ann. 394 (1841); cf. SIMES, MODEL PROBATE CODE § 96(a) (1946).

352. See La. Civil Code art. 1034 (1825).

353. See ATKINSON, WILLS §§ 112, 113 (2d ed. 1953) [hereinafter cited as ATKINSON].

354. See LA. CODE OF CIVIL PROCEDURE art. 3159 (1960).

universal practice.³⁵⁵ The possession of letters of administration or letters testamentary was necessary for the transaction of business in a land of "strangers." The Code of Civil Procedure gives express authority to the courts to issue letters testamentary or letters of administration.³⁵⁶

In the Anglo-American law the personal representative is required to bring actions necessary for the estate and to defend actions brought against the estate.³⁵⁷ Formerly, in Louisiana, although the executor or administrator was required to collect succession assets and to exercise the full power of a litigant,³⁵⁸ the executor was not permitted to bring real actions unless he was joined by the heirs and legatees.³⁵⁹ This limitation upon the power of the executor to stand as litigant was imposed as an expression of the attitude of the planter, who, in this case, permitted his feudal relationship to the soil to affect the civil law. Feudal feeling now having vanished, the Code of Civil Procedure required both the executor and the administrator to collect all succession assets and to exercise the full powers of a litigant.³⁶⁰

An administrator or an executor can sell personalty either at public auction or at private sale in the Anglo-American law.³⁶¹ In the original Louisiana law the personal representative could sell movables and immovables at public auction upon his obtaining an order of court.³⁶² The private sale of succession assets

355. *Ibid.*; LOUISIANA FORMULARY ANNOTATED, form 709 (1951).

356. See LA. CODE OF CIVIL PROCEDURE art. 3159 (1960).

357. See ATKINSON, §§ 116, 117, 127, 144; SIMES & FRATCHER, FIDUCIARY ADMINISTRATION 149-92 (2d ed. 1956).

358. See LA. CIVIL CODE art. 1049 (1870); La. Code of Practice arts. 122, 123 (1870); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So. 2d 169 (1947); *Succession of Ott*, 182 La. 850, 162 So. 642 (1939); *Martin v. Himel*, 174 La. 281, 140 So. 478 (1932); *Succession of Gragard*, 106 La. 298, 30 So. 885 (1901); *Succession of Coco*, 32 La. Ann. 325 (1880); *Succession of Decuir*, 22 La. Ann. 371 (1870); *Succession of Pool*, 14 La. Ann. 677 (1859); *Pauline v. Hubert*, 14 La. Ann. 161 (1859); *Meissonier v. Laurent*, 14 La. Ann. 14 (1859); *Longbottom's Executors v. Babcock*, 9 La. 44 (1836).

359. See La. Code of Practice art. 123 (1870); *Woodward v. Thomas*, 38 La. Ann. 238 (1886). The rule, though preserved, was very loosely applied in two later cases. See *Jones v. Jones*, 236 La. 52, 106 So. 2d 713 (1958); *Gregory v. Hardwick*, 218 La. 346, 49 So. 2d 423 (1950). The rule was applied only to the executor; it never applied to the administrator. See *Succession of Williams v. Chaplain*, 112 La. 1075, 36 So. 859 (1904); *Woodward v. Thomas*, *supra*; *Heirs of Guillotte v. City of Lafayette*, 5 La. Ann. 382 (1850).

360. See LA. CODE OF CIVIL PROCEDURE arts. 3191, 3196, 3198 (1960).

361. See ATKINSON, § 122. Statutes in all states except Virginia give the personal representative the power to sell realty upon obtaining an order of court, but only to pay debts. Even in the absence of statutory authority, the testamentary executor may be given the power to sell realty by will. *Id.* §§ 123, 124.

362. See LA. CIVIL CODE arts. 105, p. 168, 128, p. 174, 173-174, p. 246 (1808); *Vidrine v. Deshotels*, 181 La. 50, 158 So. 618 (1935); *Bender v. Bailey*, 130 La.

was not permitted. By legislative enactment, the private sale came gradually to be permitted as a recognition of a more commercial and more urban society in which the public auction drew little attention. The adoption of the private sale was delayed, undoubtedly, by the illegal and fraudulent use of the private sale in the Reconstruction era.³⁶³ In 1890 an act was passed permitting the succession representative to sell stocks and bonds on the open market.³⁶⁴ It is significant that the succession assets first permitted to be sold at private sale were stocks and bonds, assets which had no connotation of feudal power. In 1934, in an attempt to meet conditions caused by the depression, the legislature enacted a statute permitting the succession representative to make a *dation en paiement* of mortgaged succession property to the mortgagee in cancellation of the indebtedness if the value of the property was less than the amount of the debt.³⁶⁵ Throughout the period from the adoption of the Civil Code of 1808 until 1938, immovable succession property could be sold only after all movable property had been sold.³⁶⁶ This requirement that movable property be sold first, though not a manifestation of the feudal attitude that land was not a form of wealth, was a manifestation of the planter's attitude that land was the principal form of wealth. By 1938 the increased importance of intangible movable property had caused Louisianians to see that land was not the principal form of wealth. A statute was enacted that permitted all succession property to be sold at private sale and immovable property to be sold concurrently with movable property if the sale was private.³⁶⁷ In the Code of Civil Procedure both private³⁶⁸ and public sales³⁶⁹ are permitted and the rule permitting the concurrent sale of movable property and immovable property is applied to both public and private sales.³⁷⁰

In the Anglo-American law the personal representative cannot buy property of the decedent's estate or buy the interest the

341, 57 So. 998 (1912); *Heirs of Burney v. Ludeling*, 47 La. Ann. 73, 16 So. 507 (1895); *Succession of Townsend v. Sykes*, 38 La. Ann. 859 (1886); *Succession of Harris*, 29 La. Ann. 743 (1877); *Succession of Winn*, 27 La. Ann. 687 (1875); *Ballio v. Wilson*, 8 Mart.(N.S.) 344 (La. 1829).

363. See *Heirs of Burney v. Ludeling*, 47 La. Ann. 73, 16 So. 507 (1895).

364. See La. Acts 1890, No. 21. Stocks and bonds were to be sold at the rates prevailing on the open market.

365. See La. Acts 1934, No. 121.

366. See La. Civil Code arts. 105, p. 168, 128, p. 174, 173-174, p. 246 (1808).

367. See La. Acts 1938, No. 290.

368. See LA. CODE OF CIVIL PROCEDURE arts. 3281-3285 (1960).

369. See *id.* arts. 3271-3273.

370. See *id.* art. 3262.

heirs, legatees, devisees, or distributees have in the estate,³⁷¹ even through an intervening party.³⁷² These actions are considered to constitute a breach of the fiduciary's duty of loyalty.³⁷³ Sales made in this manner are not void but voidable. They may be ratified by all parties in interest.³⁷⁴ In Louisiana before the adoption of the Code of Civil Procedure a personal representative could not buy succession property either in his own name or through the medium of a third party,³⁷⁵ except in certain cases.³⁷⁶ The sale, however, was not void but voidable and it could be ratified by all parties in interest, as it could in the Anglo-American law.³⁷⁷ Although these rules were similar to the Anglo-American rules, they were derived from French sources.³⁷⁸ An important exception to the Louisiana rule forbidding sales of this type was developed as the result of a misstatement of the Anglo-American law in a case decided by the Supreme Court of the United States. In *Michoud v. Girod*³⁷⁹ the Court stated in dicta that if a fiduciary bought the whole interest of the beneficiary, under the law of equity the fiduciary relationship was terminated and the sale was valid without ratification. The Louisiana courts, following the dicta in *Michoud v. Girod*, held in two cases that if an executor or administrator purchased the whole interest of the heir or legatee, the sale was valid without ratification.³⁸⁰ The Code of Civil Procedure prohibits contracts between the personal representative and the succession and sales of succession property or interests in succession property to the personal representative.³⁸¹ The rule developed upon the incorrect dicta in *Michoud v. Girod* appears to have been eliminated from Louisiana law.

Beyond the power of sale no specific contractual powers or

371. See *Davis v. Jenkins*, 236 N.C. 283, 72 S.E.2d 673 (1952); ATKINSON, § 122.

372. ATKINSON, § 122.

373. *Ibid.*

374. *Ibid.*

375. See LA. CIVIL CODE arts. 1139, 1784 (1825); *Heirs of Wood v. Nicholls*, 33 La. Ann. 744 (1881); *Prothro v. Prothro*, 33 La. Ann. 598 (1881); *Collins v. Hollier*, 13 La. Ann. 585 (1858); *Longbottom's Executors v. Babcock*, 9 La. 44 (1836).

376. See LA. CIVIL CODE art. 1146 (1870).

377. See *Prothro v. Prothro*, 33 La. Ann. 598 (1881); *Heirs of Wood v. Nicholls*, 33 La. Ann. 744 (1881).

378. See note 377 *supra*.

379. 45 U.S. (4 How.) 503 (1846).

380. See *Ross v. Ross*, 3 La. Ann. 533 (1848); *Crow v. Griffin*, 6 La. Ann. 316 (1851).

381. LA. CODE OF CIVIL PROCEDURE art. 3194 (1960). The exceptions contained in LA. CIVIL CODE art. 1146 (1870) are preserved, however. See LA. CODE OF CIVIL PROCEDURE art. 3195 (1960).

duties were given the succession representative by the provisions of the French codes or by the provisions of the several codes in force in Louisiana before the Code of Civil Procedure was adopted. The contractual actions of the succession representative were governed in the Louisiana code provisions only by the prudent man rule.³⁸² The French doctrinal writers are in conflict as to the specific contractual powers and duties of the executor³⁸³ and the beneficiary heir who administers.³⁸⁴ The Louisiana law and the French law, in this respect, were inadequately adjusted to a commercial society. Louisiana was forced to turn to the Anglo-American law for most of its rules concerning the contractual powers and duties of the administrator and the executor.

In the Anglo-American law the personal representative has the power and is under the duty to enter into all contracts necessary to preserve the estate.³⁸⁵ Contracts of the succession representative do not bind the estate³⁸⁶ but the succession representative is entitled to be compensated for all necessary expenses.³⁸⁷ If the executor enters into a contract that specifically states he is given the power under the will to bind the estate directly by such contracts, and provides that the estate is to be directly bound, the estate is directly bound if the statement contained in the contract is correct. The executor is personally liable for breach of warranty if the statement is untrue.³⁸⁸ No specific Louisiana code provision gave the personal representative power to enter into contracts for the preservation of succession property. The Louisiana courts, in adjusting to a commercial society, permitted the personal representative to be compensated for expenses incurred directly for the benefit of the succession,³⁸⁹ although they did not permit him to bind the suc-

382. See La. Civil Code arts. 52, p. 68, 135, p. 176 (1808).

383. Cf. 10 BAUDRY-LACANTINERIE ET COLIN, *TRAITÉ DE DROIT CIVIL* n° 2634-2647 (3d ed. 1905); 5 DEMOLOMBE, *TRAITÉ DES DONATIONS* n° 65 (1880); 14 LAURENT, *PRINCIPES DE DROIT CIVIL FRANCAIS* n° 352-358 (1880); 4 MARCADÉ, *EXPLICATION DU CODE CIVIL* n° 148 (7th ed. 1873).

384. Cf. 7 BAUDRY-LACANTINERIE ET COLIN, *TRAITÉ DE DROIT CIVIL* n° 1336 (3d ed. 1905); 2 DALLOZ, *CODE ANNOTÉS (NOUVEAU CODE CIVIL)* art. 803, n° 37 (1911); 3 DEMOLOMBE, *TRAITÉ DES SUCCESSIONS* n° 228 (1879); 4 TOULLIER, *LE DROIT CIVIL FRANCAIS* n° 373-395 (6th ed. 1846-48).

385. See ATKINSON, §§ 118, 119; SIMES & FRATCHER, *FIDUCIARY ADMINISTRATION* 150 (2d ed. 1956).

386. See *Call v. Garland*, 124 Me. 27, 125 Atl. 225 (1924); ATKINSON, § 119.

387. See note 386 *supra*.

388. See note 386 *supra*.

389. See *Succession of Wood*, 186 La. 181, 171 So. 843 (1937); *Succession of Rhodes*, 164 La. 488, 114 So. 107 (1927); *Succession of Dorville*, 30 La. Ann. 133 (1878); *Succession of Henderson*, 24 La. Ann. 435 (1872); *Succession of Macarty*, 3 La. Ann. 517 (1848); *Succession of Whitehead*, 3 La. Ann. 396 (1848).

cession directly.³⁹⁰ No case that involved a contract stating that the executor had been given the power to bind the succession directly ever arose. It is not known whether the Louisiana courts would have adopted the Anglo-American refinements of the rule if presented with an appropriate case. In the Code of Civil Procedure, the succession representative is given the power and is placed under the duty to enter into contracts to preserve the succession.³⁹¹ The Code makes no mention of what is to be done if the contract states that the succession is to be bound directly. Refinements contained in the rules of other legal systems are often removed when these rules are adopted.

In the Anglo-American law the executor or administrator may continue the business of the decedent temporarily.³⁹² He is not permitted to continue to operate a business indefinitely unless he is given this power by will or by judicial order. If he continues to operate a business for an indefinite time without authority, he is personally liable for the losses sustained as a result of his actions.³⁹³ Before the Code of Civil Procedure was adopted, no code authority existed in Louisiana for continuing the operation of a business. The Louisiana courts, obviously influenced by the Anglo-American rule permitting a temporary continuation of business, held that the personal representative could continue the cultivation of a growing crop.³⁹⁴ However, no decision permitted the temporary operation of other types of business or upheld the validity of a judicial authorization of the continued operation of a business.³⁹⁵ The executor or administrator was personally liable for the losses sustained if he continued the business for an indefinite period of time.³⁹⁶ The Code of Civil Procedure, influenced by the Anglo-American law, gives

390. See *Hoss v. Jones*, 26 La. Ann. 659 (1874); *Landry v. Delas, Lorio & Co.*, 25 La. Ann. 181 (1873); *Carroll, Hoy & Co. v. Davidson*, 23 La. Ann. 428 (1871); *Livingston v. Gaussen*, 21 La. Ann. 286 (1869); *Dean v. Wade*, 8 La. Ann. 85 (1853); cf. *Succession of Nitch*, 22 La. Ann. 316 (1870).

391. See LA. CODE OF CIVIL PROCEDURE arts. 3191, 3221 (1960).

392. See *Hardy & Co. v. Turnage*, 204 N.C. 538, 168 S.E. 823 (1933); *ATKINSON*, § 121.

393. See *Beneux v. Brown Shoe Co.*, 191 Ark. 579, 87 S.W.2d 28 (1935); *Hines v. Levers & Sargent Co.*, 226 Mass. 214, 115 N.E. 252 (1917); *ATKINSON*, § 121.

394. See *Succession of Worley*, 40 La. Ann. 622, 4 So. 570 (1888); *Succession of Wederstrandt*, 19 La. Ann. 494 (1867).

395. See *McMahon*, *Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

396. See *Succession of Huxen*, 149 La. 61, 88 So. 687 (1921); *Maxwell-Yerger Co. v. Rogan*, 125 La. 1, 51 So. 48 (1910); *Wiemann v. Mainegra*, 112 La. 305, 36 So. 358 (1904); *Florsheim Bros. v. Holt*, 32 La. Ann. 133 (1880); *Carroll, Hoy & Co. v. Davidson*, 23 La. Ann. 428 (1871); *Miltnerberger v. Taylor*, 23 La. Ann. 188 (1871).

authority to the courts to order the continuation of business during the period of administration.³⁹⁷

In most situations Anglo-American law does not permit the succession representative to invest succession assets.³⁹⁸ Before the Code of Civil Procedure was adopted, it was thought that in Louisiana the succession representative could not invest succession assets,³⁹⁹ although there were no cases clearly so holding.⁴⁰⁰ The Code of Civil Procedure permits the succession representative to invest succession funds in securities included in a mandatory legal list upon obtaining judicial authorization.⁴⁰¹

It is considered improper in the Anglo-American law to deposit succession funds in a bank for an indefinite time,⁴⁰² because deposits of succession funds for an indefinite time are considered to be loans without security.⁴⁰³ Since the adoption of the Federal Deposit Insurance Act the courts and legislatures of other states have been more willing to permit the deposit of succession funds for an indefinite period.⁴⁰⁴ Originally in Louisiana no code provision permitted or required the deposit of succession funds. However, in 1837 a statute was enacted that made it the duty of the succession representative to deposit all succession funds in a bank,⁴⁰⁵ and provided a penalty of twenty percent per annum for failure to do so.⁴⁰⁶ The adoption of this statute illustrates the spirit of Louisiana legal thought at the time. In the Anglo-American states the permanent deposit of succession funds was then considered improper;⁴⁰⁷ in Louisiana

397. See LA. CODE OF CIVIL PROCEDURE arts. 3224, 3225 (1960).

398. See *In re Estate of Marchildon*, 188 Minn. 38, 246 N.W. 676 (1933); ATKINSON, §§ 124, 125.

399. See LA. CODE OF CIVIL PROCEDURE art. 3222 (1960).

400. In *Succession of Conery*, 111 La. 113, 35 So. 479 (1903) and *Succession of Sprowl*, 21 La. Ann. 544 (1869), it was stated that the succession representative was not permitted to make investments. However, the holding of *Succession of Sprowl*, *supra*, is very weak because the "investments" involved were Confederate notes and the court was a Reconstruction court. The statement in *Succession of Conery*, *supra*, is merely dicta.

401. See LA. CODE OF CIVIL PROCEDURE art. 3222 (1960); LA. R.S. 9:2061 (1950).

402. See *In re Estate of Wood*, 159 Cal. 466, 114 Pac. 992 (1911); ATKINSON, § 124; SIMES & FRATCHER, *FIDUCIARY ADMINISTRATION* 215, 216, n. 9 (2d ed. 1956).

403. See ATKINSON, § 124; SIMES & FRATCHER, *FIDUCIARY ADMINISTRATION* 215, 216 n. 9 (2d ed. 1956).

404. See note 403 *supra*; RESTATEMENT OF TRUSTS § 180, comment d, § 227, comment i (Supp. 1948).

405. See La. Acts 1837, No. 102.

406. *Ibid.*

407. See SIMES & FRATCHER, *FIDUCIARY ADMINISTRATION* 215, 216, n. 9 (2d ed. 1956).

the permanent deposit of succession funds was not only permitted, but required. Strangely enough, several months after the passage of this act the financial crisis of 1837 struck,⁴⁰⁸ many banks failed;⁴⁰⁹ yet the statute was not repealed.⁴¹⁰ In 1838 a banking law was passed by the legislature but vetoed by the Governor. The legislature failed to override his veto.⁴¹¹ The failure of the legislature to repeal the statute requiring the deposit of succession funds and its inability to enact the banking law show the magnitude of the political power wielded by the banks. In 1841 and 1842, the legislature enacted strong banking laws that made Louisiana banks the safest in the country.⁴¹² It is strange that the Jacksonian cotton farmers did not compel the repeal of the statute requiring the permanent deposit of succession funds when they acquired substantial political power under the Constitution of 1845. However, the banks continued to be very powerful politically,⁴¹³ and the legislatures that met under this Constitution were not so strongly agrarian as the Constitutional Convention had been.⁴¹⁴ The statute was never repealed. It is incorporated in the Code of Civil Procedure.⁴¹⁵

The courts held alternately that the imposition of the penalty for failure to deposit succession funds in banks was mandatory and that it was discretionary. The cases fall into a chronological arrangement that bears a relationship to the events of Louisiana history. In the only case decided in the period from 1837 to 1845, the penalty was rigidly applied because the sugar planter-New Orleans merchant coalition was in full control of the state.⁴¹⁶ In the period between 1845 and 1852, the anti-commercial small cotton farmers were in partial control of the state. However, the occupants of the bench did not respond to a political change incomplete and of short duration. The only case in this period applied the penalty as mandatory.⁴¹⁷ The planter-merchant alliance was in complete control of the state between 1852 and 1860. The penalty was applied in the only case decided in

408. See Succession of Christy, 6 La. Ann. 427 (1851).

409. *Ibid.*

410. *Ibid.*

411. See CALDWELL, A BANKING HISTORY OF LOUISIANA 62 (1935); STAN-
DARD HISTORY OF NEW ORLEANS 597 (Rightor ed. 1900).

412. See DAVIS, LOUISIANA: THE PELICAN STATE 179 (1959).

413. See 4 GAYARRE, HISTORY OF LOUISIANA 660 (3d ed. 1885).

414. See SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 130-31 (1939).

415. See LA. CODE OF CIVIL PROCEDURE art. 3222 (1960).

416. See Succession of Peytavin, 7 Rob. 477 (La. 1844).

417. See Depas v. Riez, 2 La. Ann. 30 (1847).

this period.⁴¹⁸ No cases upon the point arose in the Reconstruction era. It would be thought that the penalty would have been applied strictly at the end of the Reconstruction era because the merchant-planter alliance was again in control of the state. The banks in this period were not unsound.⁴¹⁹ However, many plantations had been seized by the banks in the Reconstruction era.⁴²⁰ There must have been a strong feeling of resentment toward the bankers among the planters. Furthermore, it was in the post-Reconstruction era, 1877-1900, that Louisiana was most in sympathy with the rest of the South, which was predominantly anti-commercial. In this period the courts considered the application of the penalty to be discretionary.⁴²¹ After 1900 Louisiana identified itself less strongly with the rest of the South because memories of the Civil War and the Reconstruction era were becoming less vivid. The merchant-planter coalition was still in power. The courts in the period between 1900 and 1928 applied the penalty rigidly.⁴²² In 1928 Huey Long was elected Governor and the merchant-planter coalition lost control of the state. In this era it is not surprising that the penalty for failure to make bank deposits of succession funds was considered to be discretionary.⁴²³ However, the anti-commercial features of the Long regime disappeared with the assassination of Huey Long in 1935. Trust estates, forbidden by the legislature as part of the "Share Our Wealth" program in 1935, were again permitted by act of the legislature in 1938.⁴²⁴ Yet, in judicial decisions rendered after 1938⁴²⁵ and in the Code of Civil Procedure,⁴²⁶ the penalty was considered to be discretionary. Although commercialism was again the dominant force in Louisiana politics, the privileged coalition of New Orleans merchant and sugar planter no longer controlled the state.

The succession representative in the Anglo-American law is under a duty to perform executory contracts if the contracts are

418. See *Reed v. Crocker*, 12 La. Ann. 445 (1857).

419. See SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* 250-51 (1939).

420. *Id.* at 248-49.

421. See *Succession of Barrett*, 43 La. Ann. 61, 8 So. 438 (1891); *Succession of Sparrow*, 39 La. Ann. 696, 2 So. 501 (1887); *Congregation v. Farrelly*, 34 La. Ann. 533 (1882); *Succession of Boutte*, 32 La. Ann. 556 (1880).

422. *Boone v. Boone*, 152 La. 208, 92 So. 861 (1922); *In re Dimmick's Estate*, 111 La. 655, 35 So. 801 (1903).

423. See *Succession of Gandolfo*, 173 La. 190, 136 So. 561 (1931).

424. See *Depas v. Riez*, 2 La. Ann. 30 (1847).

425. See *Succession of Baronet*, 222 La. 1051, 64 So.2d 428 (1953); *Succession of David*, 213 La. 707, 35 So.2d 465 (1948); *Succession of Lombardo*, 204 La. 429, 15 So.2d 813 (1943).

426. See LA. CODE OF CIVIL PROCEDURE art. 3222 (1960).

beneficial to the estate,⁴²⁷ to break executory contracts if they are detrimental to the estate.⁴²⁸ He is not expected to perform contracts involving a unique personal contribution.⁴²⁹ He is under a duty to perform partially completed building contracts.⁴³⁰ In Louisiana under the former law no cases arose that concerned performance of executory contracts by the succession representative. However, the Code of Civil Procedure, imitating the Model Probate Code, provides that the succession representative may perform executory contracts evidenced by writing upon obtaining an order of court.⁴³¹ This provision shows a partial adjustment to a commercial society.

Both the Anglo-American⁴³² and the Louisiana law require the personal representative to close the affairs of the succession as quickly as possible. This rule was never expressly stated in Louisiana code provisions. Rather, it was taken by inference⁴³³ from the code rule (which was not strictly followed)⁴³⁴ that the executor would have seizin for only a year.⁴³⁵ This rule requiring the succession representative to close the succession as quickly as possible reflects the popular feeling that the owner of property should control its use. The rule is now stated in the Code of Civil Procedure.⁴³⁶

In most Anglo-American jurisdictions the running of the statute of limitations upon debts continues although the claim of the decedent's creditor is acknowledged by the personal representative.⁴³⁷ There were no provisions in the Louisiana Codes of 1808, 1825, or 1870 permitting the running of prescription to be stopped during administration. However, the Louisiana courts held that if a personal representative acknowledged the claim of the creditor the running of prescription was suspended for the term of the administration.⁴³⁸ This rule was more ap-

427. See *In re Estate of Burke*, 198 Cal. 163, 244 Pac. 340 (1926); ATKINSON, WILLS § 120 (2d ed. 1933).

428. See note 427 *supra*.

429. See note 427 *supra*.

430. See note 427 *supra*.

431. See LA. CODE OF CIVIL PROCEDURE art. 3227 (1960).

432. See SIMES & FRATCHER, FIDUCIARY ADMINISTRATION 4-6 (2d ed. 1956).

433. See *Ferguson v. Glaze*, 12 La. Ann. 667 (1856); *Michot v. Flotte's Adm'n*, 12 La. 129 (1838); *Taylor v. Jeffries' Estate*, 10 La. 435 (1836).

434. See note 433 *supra*.

435. See LA. CIVIL CODE art. 1659 (1870).

436. See LA. CODE OF CIVIL PROCEDURE art. 3197 (1960).

437. See ATKINSON, WILLS § 127 (2d ed. 1953).

438. The more recent view was that the running of prescription was suspended, that is, that prescription did not run during the term of administration, but that it started running at the point at which it had stopped when the adminis-

propriate for a commercial society than the Anglo-American rule. In a commercial society the creditor must be able to rely upon an acknowledgment of a debt by the personal representative. The rule is included in the Code of Civil Procedure.⁴³⁹

The personal representative is required to obtain a judicial order before paying the debts of the estate in the Anglo-American law.⁴⁴⁰ In Louisiana under the former code provisions the personal representative could not pay the debts of the succession until he had filed a tableau of distribution (a proposed schedule of the payment of debts) and given public notice of his filing by advertisement and until the tableau had been homologated by the court.⁴⁴¹ Under the Code of Civil Procedure the same requirements are made⁴⁴² and an additional requirement is instituted. The personal representative is required to mail a notice of the filing of the tableau to any person who has petitioned the court for notice.⁴⁴³ This provision is intended to offer the creditor an additional protection.⁴⁴⁴ However, in *Mullane v. Central Hanover Bank and Trust Co.*⁴⁴⁵ it was held that to satisfy due process requirements the best possible notice must be given interested parties and that with respect to nonresidents whose addresses are known notice must be given by mail. Obviously, the Louisiana law was modified in an attempt to make it conform to the principles of the *Mullane* case. However, it does not appear that the degree of conformity is sufficient to satisfy constitutional requirements.

tration was concluded. See *Morris v. Executors of Cain*, 39 La. Ann. 712, 2 So. 418 (1887); *Succession of Mansion*, 34 La. Ann. 1246 (1882); *Renshaw v. Stafford*, 30 La. Ann. 853 (1878). However, many cases held that the running of prescription was interrupted, that is, that the accumulated prescriptive term was erased and that prescription started running anew immediately. *Succession of Richmond*, 35 La. Ann. 858 (1883); *Maraist v. Guilbeau*, 31 La. Ann. 713 (1879); *Sevier v. Succession of Gordon*, 21 La. Ann. 373 (1869); *Succession of Yarborough*, 16 La. Ann. 258 (1861); *Succession of Dubreuil*, 12 Rob. 507 (La. 1846). *Succession of Dubreuil*, *supra*, is particularly interesting because the court first held that acknowledgment by the personal representative suspended prescription but then, on rehearing, held that it interrupted prescription.

439. See LA. CODE OF CIVIL PROCEDURE art. 3243 (1960). The article cited takes the position that an acknowledgment of a creditor's claim by a succession representative suspends prescription. However, in the comment that follows the redactors state that the acknowledgment interrupts prescription.

440. See ATKINSON, WILLS §§ 127, 143 (2d ed. 1953).

441. See LA. CIVIL CODE arts. 1063-1066, 1180, 1181, 1184, 1186 (1870); *Succession of Conrad*, 45 La. Ann. 89, 1 So. 935 (1893); *Succession of Bougère*, 29 La. Ann. 378 (1877); *Depas v. Riez*, 2 La. Ann. 30 (1847); *Millaudon v. Cajus*, 6 La. 222 (1834).

442. See LA. CODE OF CIVIL PROCEDURE arts. 3301, 3303, 3304, 3307 (1960).

443. See *id.* arts. 3305, 3306.

444. See *id.* art. 3306.

445. 339 U.S. 306 (1950).

In Anglo-American law the personal representative is required to file an annual account.⁴⁴⁶ In Louisiana law, originally, the succession representative was required to file an annual account as his counterpart was in the Anglo-American law.⁴⁴⁷ In 1837, at the time the statute requiring the deposit of succession funds in banks was adopted, a supplementary provision was enacted requiring the succession representative to file an account at any time upon demand by any interested party.⁴⁴⁸ If the succession representative failed to file an account upon being ordered to do so by the court, he was subject to removal and a penalty of ten percent per annum.⁴⁴⁹ The requirement that an account be filed annually was contained in the Civil Code of 1870,⁴⁵⁰ but it lost all meaning because no penalty was exacted for failure to file.⁴⁵¹ Both the filing of an account annually and the filing of an account upon the motion of an interested party are required in the Code of Civil Procedure.⁴⁵² It is possible that the courts will continue to disregard the rule requiring the filing of an annual account. The adoption of the requirement that an account be filed upon the motion of any interested party discouraged fraudulent action on the part of the succession representative. Fraudulent action could not be easily concealed if the succession representative could be called upon to account at any time.

The executor or administrator is required by the Code of Civil Procedure to file a final account and to serve copies upon the heirs and legatees.⁴⁵³ This requirement is taken from a judicial interpretation of earlier code provisions.⁴⁵⁴ Under the Code

446. See ATKINSON, WILLS § 142 (2d ed. 1953).

447. See La. Civil Code art. 173, p. 246 (1808).

448. See La. Acts 1837, No. 102. This act was incorporated into the Civil Code of 1870 as article 1151.

449. See La. Acts 1837, No. 102; LA. CIVIL CODE art. 1151 (1870); Succession of Bertrand, 127 La. 857, 54 So. 127 (1911); Voinche v. Brouillette, 50 La. Ann. 370, 23 So. 318 (1898); Succession of Head, 28 La. Ann. 800 (1876); Succession of Williams, 7 Rob. 46 (La. 1844); Overton v. Overton's Adm'r, 10 La. 472 (1836); cf. Reed v. Crocker, 12 La. Ann. 445 (1857).

450. See LA. CIVIL CODE arts. 1191, 1674 (1870).

451. See Succession of Bertrand, 127 La. 857, 54 So. 127 (1911); Succession of Head, 28 La. Ann. 800 (1876).

452. See LA. CODE OF CIVIL PROCEDURE art. 3331 (1960).

453. See *id.* arts. 3332, 3335.

454. See LA. CIVIL CODE art. 1194 (1870); Landry v. Landry, 105 La. 362, 29 So. 900 (1901); Succession of Conrad, 45 La. Ann. 89, 11 So. 935 (1893); Carter v. McManus, 15 La. Ann. 676 (1860); Truxillo v. Truxillo, 11 La. Ann. 412 (1856); Bry v. Dowell, 1 Rob. 111 (La. 1841). The courts have often confused the final account and the final tableau of distribution. See Landry v. Landry, *supra*, Millaudon v. Cajus, 6 La. Ann. 222 (1834); Succession of Conrad, *supra*. For an excellent discussion distinguishing the final account and the final tableau of distribution, see Succession of Bofenschen, 29 La. Ann. 711 (1877).

of Civil Procedure the judgment homologating the final account is *prima facie* evidence of the correctness of the account and of the same effect as the final judgment in an ordinary action.⁴⁵⁵ Notice to creditors of the filing of the final account is not required.⁴⁵⁶ It therefore appears that the requirements of the *Mullane* case are met neither in the notice required for filing of the final account nor in the notice required for filing of the tableau of distribution.

The executor or administrator in Anglo-American law is personally liable for losses sustained as a result of his breach of fiduciary duty.⁴⁵⁷ Also, he is liable for all losses that occur with respect to property he purchased from the succession, property he failed to earmark, or property the custody of which he improperly delegated, although no causal connection is shown between his improper action and the loss.⁴⁵⁸ In Louisiana law the executor or administrator is liable for damages that result from his maladministration.⁴⁵⁹ He was never made liable by code provision for injuries to the succession not resulting from his improper action nor is he made liable by the Code of Civil Procedure. However, in one case he was held liable for injuries to succession property that he did not earmark, although the injuries were not caused by this failure.⁴⁶⁰ He is required to pay a ten percent penalty for failure to file an account upon being ordered to do so by the court,⁴⁶¹ and a twenty percent penalty for failure to deposit succession funds in a bank,⁴⁶² even though no loss occurs. The underlying basis for liability without causation in the Anglo-American law in situations involving the failure to earmark or the purchase of succession property is the danger of fraudulent action by the succession representative. One reason for making the personal representative liable in the law of Louisiana for penalties of ten or twenty percent for failure to file an account or failure to deposit succession funds is to

455. See LA. CODE OF CIVIL PROCEDURE art. 3337 (1960).

456. See *id.* arts. 3331-3338.

457. See SIMES & FRATCHER, FIDUCIARY ADMINISTRATION 158-60 (2d ed. 1956).

458. *Ibid.*

459. See LA. CODE OF CIVIL PROCEDURE art. 3191 (1960); Succession of Futch, 207 La. 807, 22 So.2d 125 (1945); Succession of Coco, 32 La. Ann. 325 (1880); Succession of Boudousquie, 9 Rob. 405 (La. 1845); Longbottom's Executors v. Babcock, 9 La. 44 (1836).

460. Succession of Lagarde, 20 La. Ann. 148 (1868).

461. See La. Acts 1837, No. 102; LA. CIVIL CODE art. 1151 (1870); LA. CODE OF CIVIL PROCEDURE art. 3334 (1960).

462. See La. Acts 1837, No. 102; LA. CIVIL CODE art. 1150 (1870); LA. CODE OF CIVIL PROCEDURE art. 3222 (1960).

reduce the possibility of fraudulent action. Thus, to some extent, liability without causation in the Anglo-American law and liability without injury in the Louisiana law have the same basis. However, the Louisiana rules concerning liability appear to be more commercial in spirit than the Anglo-American rules. The Anglo-American rules are drawn from the point of view of the heirs, legatees, devisees, and distributees; the Louisiana rules concerning the penalties of ten and twenty percent are drawn principally from the point of view of the creditors and the banking interests.

In Anglo-American law the executor or administrator may be removed if he breaches a fiduciary duty, mismanages the estate,⁴⁶³ or (under the statutes of many jurisdictions) leaves the state and establishes residence elsewhere.⁴⁶⁴ In Louisiana under the former law the executor or administrator could be removed for breach of fiduciary duty, mismanagement of the estate, or failure to appoint an agent for service of process after establishing domicile in another state.⁴⁶⁵ This rule is preserved in the Code of Civil Procedure.⁴⁶⁶ The purpose of the rule in Louisiana and Anglo-American law is to prevent continued mismanagement of the estate by the succession representative.

The original policy of the Anglo-American law was to require the payment of debts out of personalty before they were paid out of realty.⁴⁶⁷ In more recent Anglo-American law, with some exceptions, devises and bequests of the same class abate together.⁴⁶⁸ In the Louisiana law from the earliest times, debts were paid from universal legacies of movables and immovables and from legacies under universal title of movables and immovables before they were paid from particular legacies.⁴⁶⁹ Land and personalty in this respect were accorded equal treatment. Equal treatment of land and personalty in the matter of abate-

463. See ATKINSON, WILLS § 114 (2d ed. 1953).

464. *Ibid.*

465. See LA. CIVIL CODE art. 1158 (1870); cf. Succession of Willis, 109 La. 281, 33 So. 314 (1903).

466. See LA. CODE OF CIVIL PROCEDURE art. 3682 (1960).

467. See ATKINSON, WILLS § 136 (2d ed. 1953); SIMES & FRATCHER, FIDUCIARY ADMINISTRATION 25-28 (2d ed. 1956).

468. See note 467 *supra*. In the absence of stated or presumed intent of the testator, debts are first paid out of residuary bequests and devises, and then out of specific bequests and devises.

469. See La. Civil Code arts. 125, p. 234, 137, p. 238 (1808); Pironi v. Riley, 39 La. Ann. 302, 1 So. 675 (1887); Eskridge v. Farrar, 30 La. Ann. 718 (1878); Sarce v. Dunoyer's Executor, 11 La. 220 (1837); Aubry v. Cajus, 8 La. 43 (1835).

ment was not provided in most Anglo-American jurisdictions until rather recently. In 1808 the Louisiana law in this particular was more adjusted to a commercial society than the Anglo-American law.

The concept of legitime, an ancient doctrine found in the Roman law,⁴⁷⁰ has always been accepted in Louisiana.⁴⁷¹ Under this concept children and other close relatives are considered to be entitled to a certain proportion of the property of the decedent, their legitime, which the decedent cannot alienate by donation inter vivos or mortis causa.⁴⁷² The concept of legitime was in accord with the principles of the French Revolution, which most of the French inhabitants of Louisiana espoused. Louisiana, in providing for the legitime in the Civil Code of 1808, was both continuing an ancient civilian doctrine and adhering to a revolutionary precept, that there should be equality among the heirs.

The Louisiana rules concerning abatement of legacies in the payment of debts are apparently based upon the supposed intent of the testator. The former Anglo-American rules preferring realty to personalty in the payment of debts were similarly based upon the supposed intent of the testator (to keep land in the family) and also upon an end of public order (the keeping of land in the same great families for centuries). However, in Louisiana, an intent to impinge upon the legitime of the forced heir is considered to be a violation of public order. Therefore, the Louisiana law does not speculate as to what would be the intent of the decedent if he knew that his inter vivos and testamentary gifts would be set aside;⁴⁷³ the universal legacies, the legacies under universal title, and the particular legacies abate ratably to satisfy the forced portion.⁴⁷⁴

At any time during the course of administration the heirs can, upon demand, be sent immediately into possession under a

470. See 9 BAUDRY-LACANTINIERE ET COLIN, *TRAITÉ DE DROIT CIVIL* n° 652, 661 (3d ed. 1905); 5 TOULLIER, *LE DROIT CIVIL FRANÇAIS* n° 97, 98 (6th ed. 1848-48). The principle of *legitim* was a part of various local customs in England although it was not a part of "the custom of the realm." See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 744 (5th ed. 1956).

471. See La. Civil Code art. 19, p. 212 (1808); Dainow, *The Early Sources of Forced Heirship*, 4 LA. L. REV. 42 (1941).

472. See note 471 *supra*.

473. It does, however, recognize the testator's statement of what his intent would be if a certain legacy was found to impinge upon the forced portion. See La. Civil Code art. 34, p. 216 (1808).

474. See La. Civil Code art. 33, p. 216 (1808); *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933); *Theall v. Theall's Legatees*, 11 La. 429 (1837).

rule developed by the courts⁴⁷⁵ (upon a code article affecting executors)⁴⁷⁶ and included in the Code of Civil Procedure.⁴⁷⁷ If the heirs are sent into immediate possession after administration has begun but before it has been completed they become personally liable for the debts of the decedent just as they would be if they had initially accepted the succession unconditionally without administration.⁴⁷⁸ No parallel doctrine can be found in the Anglo-American law because there is no concept of unconditional acceptance.⁴⁷⁹ The rule permitting the heirs to be sent into possession at any moment during the course of administration was originally supported by the feudal attitudes of the planters, by the anti-commercial views of the small farmers, and by the general desire of the population to be free from judicial restraint. Now only the desire to be free from judicial restraint remains, but it is sufficiently strong to support the rule.

When the administration is concluded, in the Anglo-American law the personal representative files a statement setting forth the proposed distributions to the heirs, devisees, legatees, and distributees; the court renders a decree of distribution; and the property is turned over to those who are entitled to it.⁴⁸⁰ The Louisiana rules concerning the final legal actions required before the closing of the succession were found partly in the Civil Code and partly in judicial decisions before the Code of Civil Procedure was adopted. Code rules provided for the filing of the final tableau of distribution and the final account.⁴⁸¹ The courts developed rules providing for a judgment sending the heirs into possession and for an order discharging the succession representative.⁴⁸² These code and judicial rules are now to be found in the Code of Civil Procedure.⁴⁸³

475. *Berry v. Wagner*, 151 La. 456, 91 So. 837 (1922); *Succession of LeBlanc*, 128 La. 1055, 55 So. 672 (1911); *Barton v. Burbank*, 114 La. 224, 38 So. 150 (1905); *Succession of Charmbury*, 34 La. Ann. 21 (1882); *Soye v. Price*, 30 La. Ann. 93 (1878); *Sevier v. Sargent*, 25 La. Ann. 220 (1873); cf. *Succession of Linton*, 27 La. Ann. 351 (1875).

476. See LA. CIVIL CODE art. 1671 (1870).

477. See LA. CODE OF CIVIL PROCEDURE arts. 3362, 3372 (1960).

478. See *Berry v. Wagner*, 151 La. 456, 91 So. 837 (1922).

479. See ATKINSON, WILLS § 2 (2d ed. 1953).

480. *Id.* § 143.

481. See LA. CIVIL CODE arts. 1063-1066, 1180, 1181, 1184, 1186, 1194 (1870).

482. *Succession of Braun*, 187 La. 185, 174 So. 257 (1937); *Succession of Taylor*, 174 La. 822, 141 So. 847 (1932); *Succession of Wiemann*, 106 La. 387, 30 So. 893 (1901); *Succession of Thibodeaux*, 38 La. Ann. 716 (1886); *Succession of Powell*, 38 La. Ann. 181 (1886); Note, 27 TUL. L. REV. 134 (1952). La. Acts 1906, No. 109, prevented the heirs from taking "full and complete possession" until they had paid the Louisiana inheritance tax and been judicially sent into possession. See *Succession of Blumberg*, 148 La. 1030, 88 So. 297 (1921); Comment, 22 TUL. L. REV. 635 (1948).

483. See LA. CODE OF CIVIL PROCEDURE arts. 3361-3392 (1960).

The use of a judgment of possession is not, historically, a violation of the civilian concept of universal succession. In the Roman law and in the Spanish law the heir was required to accept the succession judicially.⁴⁸⁴ Yet, a judicial sending into possession conflicts inherently with the concept of universal succession. The French doctrine of *le mort saisit le vif* removes this difficulty. Louisiana, impelled by its history, confuses the matter by providing for universal succession,⁴⁸⁵ for the application of the doctrine of *le mort saisit le vif*,⁴⁸⁶ for a judicial sending into possession,⁴⁸⁷ and for the broad use of a judicially regulated administration.⁴⁸⁸ The different elements could be brought into rough harmony by adoption of the following principles: the heir receives ownership at the moment of death,⁴⁸⁹ but he does not receive title until he is judicially placed in possession;⁴⁹⁰ if the succession is administered, the succession representative has possession⁴⁹¹ and the capacity to alienate,⁴⁹² but ownership is in the heir.⁴⁹³

Although the judgment sending the heir into possession was used under the Civil Code of 1808, it was removed from Louisiana law by the adoption of the concept of *le mort saisit le vif* in the Civil Code of 1825.⁴⁹⁴ Sixty years after the judgment sending the heirs into possession was removed from Louisiana law it was revived by judicial decision.⁴⁹⁵ Adjustments were made in the Civil Code of 1825 to meet conditions caused by the entry of Americans into Louisiana. Yet, at the same time, an adjustment was made to satisfy the desire to be free from legal restraint in the adoption of the doctrine of *le mort saisit le vif*. Conflicting forces brought inconsistent results. After the Civil Code of 1825 had been adopted and after the Reconstruction era had passed, the judicial sending of the heirs into possession was revived because its use was desirable in a land of "strangers" in which land was bought and sold as a commodity.

484. See Rheinstein, *European Methods for the Liquidation of Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935).

485. See LA. CIVIL CODE art. 943 (1870).

486. See *id.* art. 940.

487. See LA. CODE OF CIVIL PROCEDURE arts. 3061, 3371, 3381 (1960); LA. R.S. 47:2401-2423 (1950) (especially 47:2413). See also note 482 *supra*.

488. See LA. CODE OF CIVIL PROCEDURE arts. 3081-3395 (1960).

489. See *id.* art. 940.

490. See *id.* art. 3062; Succession of Crouzeilles, 106 La. 442, 31 So. 64 (1901); Note, 27 TUL. L. REV. 134 (1952).

491. See LA. CODE OF CIVIL PROCEDURE art. 3211 (1960).

492. See *id.* arts. 3261-3285.

493. See LA. CIVIL CODE art. 940 (1870).

494. See LA. Civil Code art. 934 (1825).

495. See note 482 *supra*.

The Territory of Orleans and the succeeding State of Louisiana did not adopt its rules concerning executors and administrators as a result of force externally applied. Within, the American and Latin cultures for years existed on equal levels, each participating almost equally in the social and political life of the state. Thus, if the matter is viewed superficially, an equal chance appears to have existed that Anglo-American or civilian rules would have been adopted. However, in 1808, the migration of Americans into Louisiana had scarcely begun. The members of the Latin element of society were numerically predominant. To prevent the incurring of the permanent animosity of the Latins, the Americans consented in 1808 to the adoption of a code civilian in concept and content. Because laws remain in effect until they are changed, the selection of Anglo-American and civilian rules on an equal basis was impaired.

Many Americans and Latins in the early years of the state favored the civil law because of their sympathy with French Revolutionary principles or because of their feeling that justice required that the civil law be retained. Others struggled to establish their respective laws out of feelings of nationalistic loyalty. A tendency developed to adopt the Anglo-American law in Louisiana to establish uniformity in the laws of the American states. A desire to imitate the other states of the South tended to cause the Anglo-American law to be adopted, especially in the years following Reconstruction. Although after 1900 a movement, originating in surviving French nationalism and in a romantic devotion to Louisiana history, developed to purify the Louisiana law by removing Anglo-American provisions, the law of executors and administrators was little affected by this movement. Rather, the Anglo-American law was more fully accepted. The Anglo-American law of executors and administrators was better adjusted to a commercial society, in most respects, than the civil law as it was stated in the Louisiana and French Codes and in the French commentators.

In 1808, the year in which the Digest was adopted, strong commercial tendencies were present in the Territory of Orleans (Louisiana). Before the Civil War Louisiana society had become basically commercial. The Digest was not in keeping with commercial conditions existing in 1808. The Louisiana law of executors and administrators has constantly been changed to adjust it to the world of 1808 and to the more intricate commercial world that came into existence after that year. In most

cases, in choosing between civilian and Anglo-American rules, Louisiana has selected the rule more in keeping with a commercial society.

The private feudal attitudes of the planter gradually disappeared. Intellectual adherence to the principles of the French Revolution caused a weakening of the planter's feudal attitudes. These attitudes were further weakened by the entry of Anglo-American immigrants of lower and middle class and commercial upper class backgrounds into the planter class. The acquisition of plantation property by northern capitalists in the Reconstruction era forced the planters to become even more commercial in point of view than they had earlier been. Finally, the planters were destroyed as a class by the gradual and extensive seizure of plantation property by the New Orleans merchants.

The lower classes, influenced by the principles of Jacksonian Democracy, brought about the drafting of the Constitution of 1845. They controlled the Constitutional Convention of 1864 and again became quite influential through the Populist movement in the 1890's. However, they did not control the political structure of the state fully until the inauguration of Huey Long as governor. The assassination of Long left the state in the hands of his subordinates, who failed to understand the social implications of his proposals. The increased prosperity of the lower classes brought about a weakening of their traditional desires for agrarian legislation and freedom from the interference of creditors.

In 1803 there was in the present State of Louisiana no frontier, in the sense of a decisive boundary dividing the occupied territory from the wilderness. However, in all parts of the present state, especially in the north, large islands of unoccupied land were to be found. Most of the inhabited regions of the state lay only a few miles from the wilderness that was within. The Louisianians, living near the wilderness, resented legal restraint. Although much of the wilderness became settled, the resentment of legal restraint did not vanish. It continued to find expression, in the law of executors and administrators, in the concept of unconditional acceptance.

The Louisiana law of executors and administrators of the present day represents a partial grafting of Anglo-American rules and principles upon the civil law variously urged and resisted, defeated and accomplished by a population of different attitudes, origins, and ways of life.